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immunity from execution

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IMMUNITY FROM EXECUTION

Administrative Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

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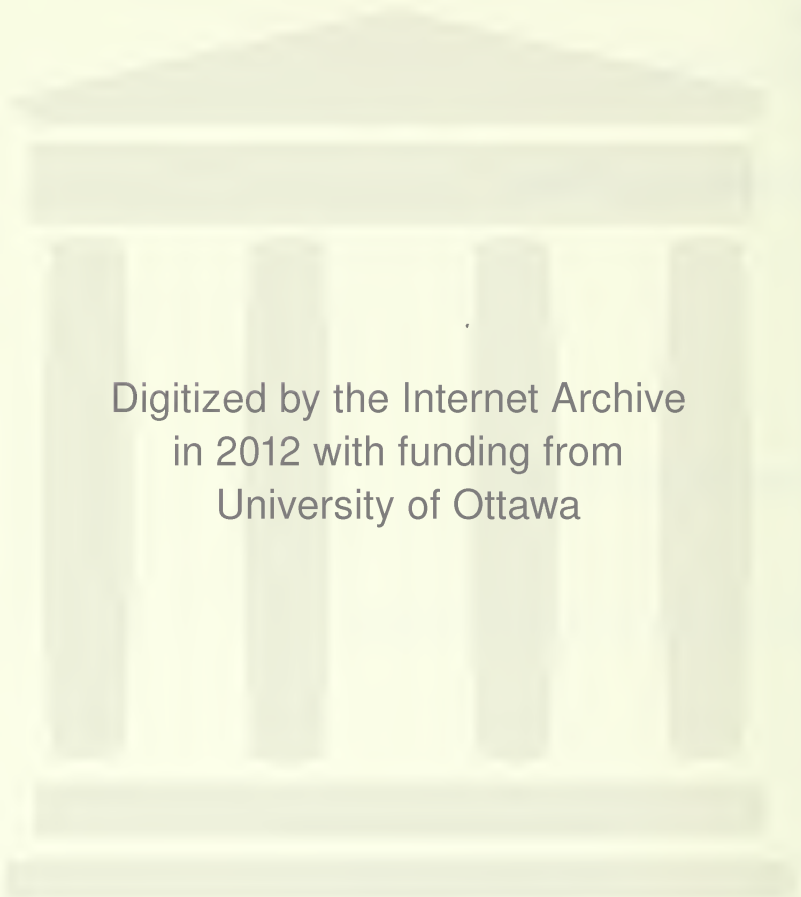

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Introduction

Working Paper 40 was published by the Law Reform Commission of Canada in July 1985 to initiate a thoroughgoing reappraisal of the legal status of the federal Administration (Canada, LRCC, 1985). The purpose of Working Paper 40 was to set out the general principles on which several monographs would be based. This Paper on Immunity from Execution is the first such detailed study. Within the framework of Working Paper 40, the Commission had no qualms about pointing to liability in tort and execution of judgments as problem areas. It stressed that its conclusions were merely speculative, aimed only at identifying problems and indicating possible policy options. This study goes beyond the speculative, and attempts to examine in detail various problems relating to immunity from execution.

The choice of this subject may seem surprising, considering that other privileges currently enjoyed by the federal Administration would seem to pose more urgent practical problems. Empirical data suggests that, in fact, immunity from execution is not a source of significant difficulty. In general, the federal Administration complies with court decisions. Hence, the rationale for this study must be found elsewhere.

This study is only part of an extensive research programme. In undertaking a critical reappraisal of the legal status of the federal Administration, the Law Reform Commission of Canada intends to make an exhaustive study in this area. This study is an indispensable component of the attempt to modernize and actualize this area of the law. Only the fact that it constitutes the first of the monographs may raise questions.

Basically, the choice of this topic stems from the very nature of the immunity which is in question, as well as the impact that amending it may have on any reappraisal of other governmental privileges. To the law reformer, immunity from execution is one of the most formidable privileges. Its apparent invulnerability constitutes a major challenge. Moreover, it underlies the general belief that Government entities are subject to a distinct body of law, from which the principles and concepts of ordinary law are automatically excluded. Federal and provincial authorities may claim complete immunity from all manner of execution process. This theoretically exempts them from forfeiture, destruction and dismantlement, eviction, retention, sequestration, affixing of seals, seizure before and after judgment, search and seizure, taking of inventory, forced sale, legal assignment, seizure by garnishment, examination after judgment, accounting, ejectment, distraint, provisional execution, possessory action, appointment of curators, giving of security, seizure in execution, and finally, injunctive relief.*

* This list represents the correct English civil law terms. Catalogues and comparisons for all immunities in the many Canadian jurisdictions are clearly beyond the scope of this document. Evolution has taken place within the particular circumstances of each Canadian jurisdiction. However, it may be said that, in general, there are several examples of execution process which are not available for debts owing by the Crown; among these are attachment of debts, appointment of a sequestrator and appointment of a receiver. In England *fieri facias*, sequestration, writs of delivery and examination of the judgment debtor are excluded from applying in respect of orders against the Crown. This is true for judgments, decrees, rules, awards or declarations in that country — TR.

Because the federal Administration typically accedes to the special prerogatives of the Crown, its immunity seems both total and invariable. It is exempt from official coercion in the execution of judgments against it, whether pretrial, interlocutory or final. Even the *Garnishment, Attachment and Pension Diversion Act* does not fundamentally alter this immunity, because this liberalizing statute is actually directed against Government employees and agents, not against the Crown itself. What is more, the Act gives only limited recognition to the garnishment principle; section 18 of the Act states that "[n]o execution shall issue on a judgment given against Her Majesty in garnishment proceedings permitted by this Part." In other words, Her Majesty has a duty to pay the salary of one of her employees to a creditor, but can in no way be compelled to do so. It is indeed a strange statute which, while permitting a degree of compulsory execution, ultimately ends up by ruling it out.

Immunity from execution is part of the hard core of Government privilege, to which any change seems out of the question from the start. In an attempt to shed new light on this apparently invulnerable privilege, this study is intended to be innovative. Its main aim is to rationalize an area of the law which all too often only reflects vested interests. Any effort to modernize the Administration's legal status must, therefore, escape these inherited obstacles, and explore the broadest possible range of options.

These obstacles are significant. Underneath the legal rhetoric, immunity from execution reflects a distinct conception of the State and the Administration. Not only does the Government enjoy a monopoly of constraint and organized force, its special pre-eminence is also reinforced by an exemption from such constraint. The rationale lies in a *reductio ad absurdum*: the Administration cannot turn its exclusive power on itself. The Administration is the police, whether in judicial or administrative enforcement proceedings. In this light, the purely legal concept that judicial decisions are to settle disputes finally and must be complied with as rendered (*res judicata*), is essentially theoretical. According to the Rule of Law, the Administration must comply with orders of the legislative and judicial authorities. Does this safeguard make reform unnecessary? If the Administration, willingly or unwillingly, complies with judicial decisions, is not the extraordinary nature of the existing immunity only of minor importance?

Immunity from execution is a matter of ongoing concern in several Western countries: studies reveal that in France and the United Kingdom the Administration, by various means, has frequently refused to comply with the substance of a decision. Whether the absence of similar studies in Canada should be taken as evidence that the federal Administration complies with court orders in all respects is not all that crucial to determine as a factual matter. What really matters is whether immunity from execution is a notion which should be even relevant today. Because much administrative action has an undeniably industrial or commercial aspect, a general principle of immunity seems excessive. In modernizing the law, should one not be concerned to reflect the true nature of administrative action? Furthermore, under exceptional circumstances the Administration may cite Government privilege or reasons of public policy as reasons for declining to comply with a court decision. Theoretically, it can do so by invoking the special prerogatives of the Crown. Is not the continued existence of Crown immunity justification enough for endowing the individual with tangible safeguards? It is not assumed here that the Administration's future conduct will be either good or bad. Rather, the extraordinary nature of existing immunity is simply ripe for reappraisal according to new standards.

There are several possible avenues of reform. Between the extremes of wholesale application of ordinary law and preservation of the existing immunity, a compromise solution may be found in the notion of a special legal regime applicable to the federal Administration. How can the need for effective administration be reconciled with demands for justice from those who have paid dearly for judicial recognition of their rights? Do the concepts of democratic administration and the submission of the Administration to law necessarily imply a legal position identical to that of the individual? Or should the Administration be beyond compulsion of any kind, in the interests of fulfilling public policy objectives? These complex questions admit of no simple or categorical answers.

Working Paper 40 proposed some general principles to guide resolution of these types of questions (Canada, LRCC, 1985). First, traditional Crown privileges and immunities were shown primarily to benefit the Government and the Administration. Our analysis, therefore, is focussed on the Administration itself, and not on the supralegal entity called the Crown. This approach facilitates concrete discussion of the operations of the modern Administration, and permits a proper balance, better in tune with social and economic reality, to be struck between the competing interests of the individual and the Administration.

The nature of the analysis which follows is thus quite clear. It seeks to develop safeguards which are responsive to the actual practices of the Administration. Initially however, the main problems inherent in the present system must be identified. Chapter One is therefore devoted to a discussion of current law (Chapter One: *Existence of This Extraordinary Privilege*). Chapter Two focusses on specific reform proposals in light of the experience of different foreign countries (Chapter Two: *Reappraising Immunity from Execution*). This initial research is all the more important because there has apparently been no in-depth study of this subject in Canada.

CHAPTER ONE
Existence of This Extraordinary Privilege

Only that part of the federal Administration that benefits from the legal status of the Crown can claim full immunity from forced or compulsory execution. That part which "is not the Crown" may be exposed to execution process in the same way as any individual. It has, therefore, been necessary to clarify the nature of the Crown's special legal regime. This has occurred in two ways. First, both Parliament and the courts have spelled out the foundation of this regime (Section I: *Express Recognition of Immunity from Execution*). This consists of a formal prohibition upon recourse to execution process. Second, on a more concrete and pragmatic level, the principle of immunity puts in doubt the availability of the declaratory judgment or the usefulness of pleading *res judicata*, to compel the Crown's compliance with a judgment. What is more, the Administration is often able to create a new situation, either in fact or in law, which would make the very idea of execution meaningless (Section II: *Absence of Legal Safeguards relating to the Execution of Judgments*). Taken as a whole, therefore, it is difficult to gain an exact sense of the nature and extent of official non-compliance.

Section I: Express Recognition of Immunity from Execution

There is no doubt about the existence of immunity from execution. The fact that it is declared expressly makes any direct challenge difficult, and explains why the courts as a general rule have construed it in a manner favourable to the interests of the Administration. Yet any analysis limited only to a list of relevant enactments and precedents would give an inadequate picture of what is in reality a founding principle. Behind formal appearances are deep-rooted assumptions linked to a well-defined conception of the Administration and the Government. Reflected more or less articulately in the concept of the Crown, these assumptions make it possible to justify a view of the Government as being above ordinary law.

I. *The Dual Source of Immunity from Execution*

Legislative enactments which are considered to codify customary law are the primary source of immunity from execution. But custom remains of great significance, because it helps explain a rationale for immunity which may not be evident from a simple reading of these statutes. The common law in this case shows that purely legal arguments are linked with more contingent factors. In conferring special privileges on

the Royal Administration, English common law was in fact recognizing the special pre-eminence of an important part of the administrative function. Consequently, practical reality explains much of the origin of this special Crown privilege.

A. Legislative Codification

Although immunity from prosecution has now been codified, its full significance can only be understood by an examination of its medieval origins. When the person of the Monarch and the State were one and the same, he as an individual owned all "public" property.[1] His personal domain, and specifically everything within his *dominium*, was exempt from the ordinary law of compulsory execution. Originally, "His Majesty's Service" was not to be disrupted in any way, nor was he to be disturbed in the enjoyment of his property. In a legal system which has never recognized the existence of either the State or the Administration, this immunity simply continued to be associated with the Crown. Distinctions drawn in other systems between public and private domains, natural and artificial persons, Head of State and Crown, are simply inapplicable. The fact that most State property still belongs to the Crown, without distinction as to its purpose or function, explains the general and absolute nature of immunity from execution. It is precisely because the concept of the Crown continues to embody the State in all its various manifestations, that any change seems unthinkable.[2] In his classic work, Chitty describes this strange situation through direct reference to the person of the King: "Even if a subject succeed in a petition against the King, His Majesty's goods are not liable to be taken in execution" (1820: 376).

Time has clearly worked against this reference, however, because in the early nineteenth century it was unlikely, to say the least, for distinctions to be made between State and Crown. Strictly speaking, Chitty's definition is too narrow. His statement of the common law rule is limited to cases of seizure of property, whereas in actual fact the immunity enjoyed by the Crown is much broader. The English codification of 1947 approximates the present state of the common law. It provides that a court may not order any seizure, garnishment or other similar measure to obtain payment from the Crown of a sum of money (*Crown Proceedings Act, 1947*, s. 25). Yet even here, the description of Crown immunity is incomplete because it is limited to orders to pay money. Actually, the Crown cannot be compelled in any way, either to undertake a given act, or to refrain from acting. The concepts of "specific performance" and "mandatory injunction" cover situations where a court might order that a particular act be carried out. But the very idea of unilateral force and constraint in a judgment is incompatible with Crown immunity. The 1953 Canadian codification better expresses the real nature of Crown immunity: "No execution shall issue on a judgment against the Crown given under this Act" (*Crown Liability Act*, s. 17(1)). This provision is complemented by section 6, which states:

> Nothing in this Act authorizes proceedings *in rem* in respect of any claim against the Crown, *or the arrest, detention or sale of any Crown ship or aircraft, or of any cargo or*

1. "Perhaps the most important influence of these feudal ideas may be found in the confusion between proprietary rights and governmental rights which was fostered by them .... No distinction is drawn between the King's private property and the property which he holds in the right of his crown" (Holdsworth, 1966: 462).

2. On the survival of the unitary principle, see Canada, LRCC, 1985: 6.

other property belonging to the Crown, or gives to any person any lien on any such ship, aircraft, cargo, or other property.[3] [Emphasis added]

But the defect of these provisions is that they contemplate only Crown liability in tort. It is thus no surprise that in 1970 Parliament went still further, providing in subsection 56(5) of the *Federal Court Act* that "[n]o execution shall issue on a judgment given by the Court against the Crown." This privilege may therefore be invoked in the Federal Court regardless of the type of litigation. The net result of these enactments is that, federally, all aspects of the traditional Crown immunity from enforcement proceedings are now codified.

In addition to these basic federal statutes, there is a uniform body of analogous provincial enactments. In Québec, section 94.9 of the *Code of Civil Procedure* favours the Crown by prohibiting post-judgment examination, provisional execution, seizure, compulsory execution, judicial sale, auction and adjudication. All procedural rules and recourses that ordinarily apply as between individuals are of no avail in the execution of a judgment against the Crown.

The same is true of common law provinces. All enactments dealing with the Crown have a stock provision directly ruling out any form of compulsory execution. For example, section 25 of the Ontario Act (*Proceedings Against the Crown Act*) provides that "[n]o execution or attachment or process in the nature thereof shall be issued out of any court against the Crown." Statutes of other provinces include a section which seemingly limits the exclusion of compulsory execution to orders to pay money ("... shall be issued out of any court for enforcing payment by the Crown of money or costs").[4] But, because they invariably contain another provision stating that "... the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties,"[5] the general immunity is preserved. Under these provisions, a judgment against the Crown can only be declaratory and can confer no right, a feature which still further extends the scope of immunity from execution. Indeed, it is not only coercion which is rejected, but the entire concept of an executory judgment. A judgment against the Crown is no more than an act of recognition; the court simply acknowledges the existence and the extent of an obligation; its decision ultimately lacks the executory effect which is thought, in classical analysis, to define the concept of a judicial judgment. On the provincial level, the already special position of the Crown is singularly enhanced. Does it follow that federal authorities cannot claim that judgments are only declaratory?

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3. Generally, this formulation excludes *in rem* proceedings against the Crown. In the common law tradition, *in rem* proceedings apply to property of any kind. As compulsory execution against the Crown is excluded, it is fair to deduce that no action may be aimed at forced restitution or dismantlement of a public work belonging to Her Majesty. Immunity from execution goes beyond the mere impossibility of resorting to traditional means of compulsory execution, but also covers the use of public force. For public buildings, there is therefore an analogy with the French rule by which [TRANSLATION] "a badly located public work cannot be destroyed." See Di Qual, 1964, and Blaevoet, 1965.

4. See for example Alberta: *Proceedings Against the Crown Act*, s. 25; Manitoba: *The Proceedings Against the Crown Act*, s. 19(6); New Brunswick: *Proceedings Against the Crown Act*, s. 17(6).

5. See to this effect Nova Scotia: *Proceedings Against the Crown Act*, s. 15(2); Prince Edward Island: *Crown Proceedings Act*, s. 15(4); Saskatchewan: *The Proceedings Against the Crown Act*, s. 17(2).

In the absence of an analogous express federal enactment this might well appear to be the case. Although subsection 56(5) of the *Federal Court Act* states that "[n]o execution shall issue on a judgment given by the Court against the Crown," and hence it may be deduced, *a contrario*, that such a judgment may only be declaratory, such a deduction is not particularly persuasive. Section 44 of the Act also states that the Court "may grant ... a *mandamus*, injunction or order for specific performance ... or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, ..." without expressly excluding the Crown. But since subsection 44 is contradicted by subsection 56(5), which deals specifically with execution, it is quite likely that the former provision as a whole does not apply to the Crown. Such a conclusion is supported by Rule 605 of the *Federal Court General Rules*, which states that a judgment against the Crown shall be a declaration that the private individual is entitled to relief. Therefore, on both the provincial and federal levels, it would seem that only judgments with declaratory effects may be set up against the Crown. As concerns its exposure to compulsory execution, the Crown in right of Canada enjoys the same immunities before all Canadian courts.

Besides these basic provisions, there exist, at the federal level, several complementary statutory rules. For example, section 18 of the *Garnishment, Attachment and Pension Diversion Act* provides that "[n]o execution shall issue on a judgment given against Her Majesty in garnishment proceedings permitted by this Part." Mention should also be made of subsection 40(1) of the *National Harbours Board Act* which states that "[n]o execution shall issue on a judgment against the Board for the payment of money." These examples could easily be multiplied, especially as concerns the exemption of pensions or benefits from attachment.[6] Similarly, under section 17 of the *Visiting Forces Act*, foreign military personnel enjoy complete immunity from enforcement of a judgment. Basically the same is true for Canadian Forces personnel under section 225 of the *National Defence Act*. Finally, under sections 10 and 11 of the *State Immunity Act*, foreign States enjoy an immunity from attachment and compulsory execution in Canada, except — and this is an important proviso — in respect of their commercial activities.[7]

B. Recognition of the State's Special Pre-eminence

Despite the clarity of their terms, these various statutory provisions do not by themselves constitute the true basis for the Crown's immunity from execution. Rather,

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6. See: *War Service Grants Act*, s. 30(1); *Veterans Allowance Act*, s. 17; *Department of Transport Act*, s. 18(1); *Western Grain Stabilization Act*, s. 25; *Prairie Farm Assistance Act*, s. 8; *Public Service Superannuation Act*, s. 9 (amended expressly by s. 39 of the *Garnishment, Attachment and Pension Diversion Act*); *Armed Forces Superannuation Act*, s. 8(6) (amended expressly by s. 41 of the *Garnishment, Attachment and Pension Diversion Act*); *Royal Canadian Mounted Police Superannuation Pension Act*, s. 8(6) (amended expressly by s. 43 of the *Garnishment, Attachment and Pension Diversion Act*); *Merchant Seamen Pension Act*, s. 9; *Pension Act*, s. 23(4).

7. On this statute, see specifically Turp, 1982-83. This article provides interesting references to the practical and theoretical problems relating to State immunity under national systems. See to this effect Sucharitkul, 1976; Vincke, 1969; Dresler, 1978.

this basis must be found in the underlying principles which define and legitimize specific legal rules. Custom may undoubtedly provide some justification, but there again the simple weight of history and institutions does not provide a satisfactory explanation. Customary rules only persist because they are based on certain subjective perceptions which are somewhat confusedly related to reality. Practical realities contribute to the formation of a customary rule, and as long as a rule is believed to be valid, nothing will challenge its existence. Apart from the simple passage of time, a customary rule evolves from an original situation which requires a distinct rule. In the case of immunity from execution, then, we must examine the facts and reasons which account for the recognition of this allegedly exceptional situation. Here the arguments in favour of immunity are no more than peremptory.

1. Monopoly of Constraint

Quite apart from the theory of the special pre-eminence of the State, immunity from execution can be justified by arguments which seem to preclude debate. Recourse to a *reductio ad absurdum* is the most important of these. It would be a complete absurdity to make the State, which is the supreme public authority, subject to its own power of constraint. As Robertson observed earlier this century, "The King by his writ cannot command himself" (1908: 2). Even today, many commentators are bemused at the thought of the State using its own police forces to compel itself to perform or abstain from some act. This rationale should not be lightly dismissed, because the State alone possesses the means of organized constraint, in the form of the army and the police forces.[8]

The State's monopoly is in no way affected by the presence of private security services. These only exist by virtue of State authorization, and their operations are subject to Government approval. In modern legal theory, the very idea of institutional constraint or organized force is held to derive essentially from the State.[9] The principle that no one may take justice into his own hands implicitly supports this view. The State alone has the power to coerce, a power that jurists such as Dicey see vested theoretically in Parliament and the judiciary. But by its very nature, this coercive function is principally the province of the Executive and the Administration. They alone have the physical means to carry it out. Enforcement implies discretion and adaptation to specific circumstances, tasks that only the Executive is well suited to perform. This discretionary element helps explain why the courts, despite their authority to adjudicate, have never been permitted to compel individuals directly. They may order that compulsion be deployed, but must rely on intermediaries to effect it.

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8. In a statement that remains valid for most contemporary States, Vedel and Delvolvé point out that:

   [TRANSLATION]
   Neither the courts nor the individual may use armed force. In principle, the executive branch must assist in the execution of judgments and similar acts, something which takes place under its responsibility and direct authority. Therefore the role of organized constraint within the State belongs to the executive branch. It is not alone with a duty to enforce the law, but it is alone in being able to use force to ensure compliance (1982: 57).

9. [TRANSLATION] "The law of public power ... encompasses an idea of power and strength that is identified with the very concept of the State" (Hirt, 1954: 968).

To the extent that many jurists consider the Crown to comprehend the State and the Executive,[10] it is this institution which is the ultimate source of the coercive power. The assimilation of the State to the Crown is no accident, since in the past all public power (*imperium*) was exercised by the Sovereign personally. Some of this *imperium* still exists, by virtue of the royal prerogative, in the Crown's exclusive power to command the armed forces. The modern Crown, however, is a legal fiction from which the coercive power of the Administration is derived. French administrative law has a similar notion, with its concept of *puissance publique*; so too German administrative law, with its concept of *Eingriffsverwaltung*.

A like observation may be made about judicial power, because historically the courts were principally the King's courts. Far from being opposed to the courts' powers, the King's power of coercion is the tangible underpinning of judicial authority. The Crown assures the independence and authority of the judiciary. History suggests why the dependence relationship cannot easily be reversed to permit courts to dictate Crown conduct. Even if the history of English law shows the powers of Parliament and the courts to have been gradually taken from the Crown, the latter still possesses a special pre-eminence.

The Crown may have lost the core of its curial and "legislative" powers (royal ordonnances), but its ultimate authority still remains and all components of the State apparatus are derived from it. The invention of the concept of the State during the Middle Ages provided the rationale for the Sovereign progressively to take over all powers (legislation, justice, police, allegiance) that previously had been dispersed throughout the feudal system. But this does not mean that today the Crown alone, in the person of the Monarch, possesses an unlimited power, which pre-empts and dominates all State functions. State power is legally limited by the Rule of Law (Preamble of the *Constitution Act, 1982*). Consequently, there is more than mere self-limitation on the power of the State: [TRANSLATION] "The State does not limit itself; it is born limited."[11] Only during periods of crisis or emergency do these limits give way to a legally limited exercise of State power. Such events permit a return to the very origins of the power via the Administration and the Government. Even if the *Canadian Charter of Rights and Freedoms* must be respected in the ordinary exercise of governmental coercive power, the power itself remains an autonomous reality somewhat confusedly identified with the concept of the Crown. Through its link to the Crown, an important part of the federal Administration avoids, at least theoretically, any form of legal constraint on its power. Yet this is paradoxical, since principles such as the Rule of Law and separation of powers require that the Administration be subject to judicial review.

In addition to these customary and historical justifications for immunity from execution, neo-positivist conceptions of the State provide another rationale. Like the premises of a syllogism, this rationale may be stated as follows:

1. There can be no recourse to public force against the State (major premise).
2. But the Crown symbolizes the State, and ultimately, it wields the State's power of constraint (minor premise).

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10. Hogg, 1977: 164; Griffith and Street, 1973: 246; Mr. Justice Beetz in *The Attorney General of the Province of Quebec* v. *Labrecque* 1082; Laskin, 1969: 117-9.

11. [TRANSLATION] "The State is limited by law because its very own power is conditioned by the idea of law which legitimizes it" (Burdeau, 1949: 286).

3. Therefore, the Crown cannot be compelled in any way (conclusion).

Of those considered, this kind of rationale is the most convincing. Any attempt to modify the principle of immunity from execution sooner or later confronts the superior and absolute rationality upon which it seems to rest: it would be absurd for the Crown to be compelled by its own power to perform or abstain from some act.

2. The Budgetary Authorization Rule

The budgetary authorization rule is certainly no basis for immunity from execution, but it is directly derived from the same basis, being a consequence of the Rule of Law and separation of powers principles. In theory, the Administration cannot act without Parliamentary authorization. Hence, were it to comply with a judgment without Parliamentary authorization, it would be acting illegally.

The budgetary authorization rule requires that all expenditures by the Administration be previously authorized by Parliament (Garant, 1985: 373). Historically, this rule was expressly directed to the Crown (Campbell, 1969: 138; Street, 1949). But today, even though the *Financial Administration Act* alludes several times to Her Majesty's spending power (sections 25, 33 and 36), it also states that the budgetary authorization rule applies to the entire Administration, even those parts which are not Crown agents (section 19).

To resist execution of a judgment, the Administration shields itself with this requirement, refusing to make a payment which has not previously been authorized. Respecting the principle of authority of *res judicata* would compel it to act illegally (Le Brun and Déom, 1983: 268). This potential loophole exists not just for simple money judgments. All the Administration's activities are constrained financially. If the courts order it to perform some act, the Administration might claim that such performance goes beyond its normal activities, and entails additional costs and expenses. Here also, the budgetary authorization rule could be just as crippling.

Is the budgetary authorization rule as much of a constraint as has been suggested? "It is the general practice throughout the Commonwealth, in statutes authorizing suits against the crown, to provide that judgments against the crown are to be satisfied only by grants made by Parliament for that purpose" (Street, 1949: 40; see also Stewart, 1979: 818). To standardize and simplify the process of payment of judgments, Crown proceedings statutes generally specify that the Minister of Finance may or shall pay sums awarded by a court from public funds. But do such declarations amount to Parliamentary authorization for unanticipated expenses? The drafting of some enactments may provide guidelines. For example, subsection 57(3) of the *Federal Court Act* provides that "[t]here shall be paid out of the Consolidated Revenue Fund any money or costs awarded to any person against the Crown in any proceedings in the Court." The Administration may accordingly comply with a money judgment without any specific authorization, since the enactment is only a direction as to how funds are to be drawn. But as subsection 17(2) of the *Crown Liability Act* illustrates, it is still necessary that the Administration be required to pay. Subsection 17(2) states that "[u]pon receipt of a certificate of judgment against the Crown ... the Minister of Finance may authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown under this Act." This subsection is not clear about whether there is an actual obligation to make payment.

Could the Minister invoke accounting requirements to postpone payment to another fiscal year? Could he make a series of installment payments so as not to exceed the limits of various budgets? Whatever the situation where the Crown is debtor of a money judgment, the budgetary authorization rule can become a real obstacle when the Administration is ordered to perform a specific act. Supplementary work or repairs may well involve expenditures that exceed budgetary resources for a given financial year.

The scope of the budgetary authorization rule is not nearly as clear as would be hoped. However, since in some cases it might eventually be involved as a legal justification for refusing to comply with a judgment, it must be taken into account in this analysis.

3. The Idea of Special Pre-eminence

Such themes as monopoly of constraint and budgetary authorization suggest a rationality to the immunity from execution principle. Other equally powerful arguments are founded on a particular conception of the State. Immunity from execution may be viewed as one of the attributes of sovereignty. Here we are not concerned with sovereignty in its external or inter-State dimension, but rather with how it is distributed within a State. With respect to the balance of power between institutions, its import may vary considerably, and given the absence of a general theory of the State, certain of its aspects remain obscure. Nevertheless the Executive and the courts do not enjoy equal sovereignty.

(a) *Paramountcy of the Executive*

Once again, the uniqueness of English institutions is of crucial importance here, with history revealing that the judiciary has not really been understood as vested with a part of State sovereignty. Originally, sovereignty was located solely in the Monarch himself. In the Middle Ages, canon law jurists began to apply the political conceptions of the late Roman Empire (*dominium* and *imperium*) to develop a theory, according to which State and sovereignty inevitably coincide in the physical person of the King. Thereafter, the concept of sovereignty was thought necessarily to presuppose a material and conceptual unity that excluded any possible division. This association of sovereignty and the Crown was so strong that as late as 1765, Blackstone said that "the law ascribes to the king the attribute of sovereignty, or pre-eminence" (p. 234). And yet we know what had already become of this regal sovereignty. With the Parliamentary revolutions of the seventeenth century, the Crown was forced to relinquish an important part of its authority. However, this concession amounted to a sharing, not a total abdication of sovereignty. Indeed, even if the common law system is governed by principles which proclaim Parliamentary sovereignty and which subject the Crown to the law, royal institutions still remain the source of sovereignty in the State. Orthodoxy in English public law defines sovereignty as "the Queen in Parliament," a somewhat peculiar expression which captures the hybrid power sharing between Executive and legislative organs.[12] Even today the Monarch personally exercises a part of this

12. "[W]e continue to speak of legislation enacted by the Queen in Parliament, of executive powers exercised by Her Majesty's Government, of justice administered in the Queen's courts" (Wade and Phillips, 1980: 233).

sovereignty in the form of the royal prerogative (de Smith, 1981: 145 ff.; Wade and Philipps, 1980: 233 ff.). Through its association with the Crown, the Government possesses its own powers and means of coercion which make it the true centre of power today. Even if, for political and ideological reasons, constitutional theory emphasizes the role of Parliament and the courts, in reality the common law system assumes the paramountcy of the Executive.

If one considers only the theoretical requirements of the Rule of Law, the courts' constitutional status seems to be identical to that of the Executive. Does this then not suggest that courts derive their authority from Parliament? A study of the constitutional basis of judicial review shows that things are more complicated. Historically, the judicial function emanated from the person of the Sovereign, and this original link has never fully been severed. Initially, justice was administered directly by the King in his *Curia Regis* as first lord of the Kingdom (Turner, 1968: 15). The judicial function represented a component of sovereignty because courts were empowered to settle disputes and state the law. Though it is still clear today that judicial authority flows from the Crown, the intervention of Parliament has ensured a measure of judicial independence.[13] While English courts managed to acquire a degree of autonomy prior to 1701, their independence was truly secured with the *Act of Settlement, 1701* (Strayer, 1983). For their administrative operations, and for the appointment of their judges, the courts still depend on the wishes of the Executive (Hood Phillips and Jackson, 1978: 377), which is legally "the Crown in its Executive role." Since the authority of the judiciary is derived from two sources, the Crown and Parliament, the courts cannot be seen as exercising independent sovereignty. They are only sovereign for the specific requirements of their judicial function.

These observations suggest reasons for the considerable differences in the roles of State organs, even if they all exercise some element of sovereignty. These differences imply a complex hierarchy of relationships. The fact that the judicial function does not enjoy the same status as the Crown is too easily forgotten. The problems experienced by the courts in dealing with acts resulting from exercise of the royal prerogative reveal their inferior status. When the Administration exercises that element of sovereignty flowing directly from the Crown, it too is accorded a pre-eminence which is totally at odds with widely held views of the relationship of Executive and judiciary. When the Administration can claim the legal status of the Crown, it accedes to a higher sovereignty within the State and may set up the Crown's own privileges and immunities. In recognizing such a status, Parliament must be taken as intending to grant the Administration a special pre-eminence, subject to review only by the Executive (Canada, LRCC, 1985: 17).

(b) *Primacy of the General Interest*

This pre-eminence of the Administration via the Crown materializes in the partial exclusion of ordinary law. Special rules apply to special situations — as if the idea of differentiation were naturally predetermined. What is more, the progressive elimination of royal prerogatives has caused problems, because many of these privileges have

13. For a synthetic view of this evolution, which culminated in the seventeenth century after a long series of battles between the King and the courts, see specifically Vallières and Lemieux, 1975-76: 270-8.

simply been transferred to the Executive. The Crown is still held to be vested with sovereignty and authority. The Crown reflects the notion of *jus eminens*, by which the rights of the State are higher and prevail over those of the individual.

Legal theorists have proposed a variety of approaches to prevent this pre-eminence from becoming too absolute or excessively authoritarian. With the advent of legal positivism, theocratic explanations of sovereignty have been replaced by so-called "objective" considerations. Austin refers to "the sociological reality of power" (Lloyd, 1981: 177). Kelsen (1962: 272) refers to a "hypothetical fundamental standard" (*Grundnorm*) from which all power within the State is derived. That is, sovereignty is justified differently today. It is presented more as an expression of the imperatives of the general interest than as a form of transcendent authority (Lloyd, 1981: 170). This general interest approach is a rather easy expedient for justifying State immunities. It links sovereignty to the public interest which, by its very nature, requires procedures and institutions which prevail over private interests (*jus publicum privatorum pactis mutari non potest*). But such a view completely turns the tables. The State's special pre-eminence is claimed to be needed to meet the needs of the general public interest. Yet this really amounts to its taking precedence over individuals in order to serve them better. In this public interest conception, then, all that remains of the idea of sovereignty is a functional dimension by which the ends determine both status and means. The current concept of Crown agent rests on a similar logic, in that it justifies granting special authority to an administrative entity to achieve general public purposes. Whether it is merely a pretext or a concrete reality, the idea of general public interest fuels rhetoric which is unfavourable to improving judicial review (Kerr, 1981: 7). Public utility and general interest thus appear as concepts derived from royal absolutism. They simply suggest a more social and democratic justification for the privileged status of an important part of the Administration, something that only further inhibits the process of reform.

Subjective (and rhetorical) obstacles to modifying the principles of immunity from execution, therefore, are just as formidable as those that show a rational face. Indeed, would allowing compulsory execution not weaken State authority, or negate imperatives originating in the search for the common good? We must ask whether those preoccupations guide the courts in refusing to question this aspect of Crown immunity.

II. *Favourable Judicial Interpretations of Immunity from Execution*

For the most part, courts rarely question the principle of immunity from execution; they thereby reinforce it. Moreover, there is little case-law on the subject, so that existing precedents may not be representative. But there are few precedents in many areas of Anglo-Saxon administrative law. Subjective factors are probably responsible for the paucity of litigation. Because lawyers are convinced of Crown immunity, they will hardly risk challenging it with execution proceedings that are doomed to fail. The rare precedents which do exist are genuine test cases, where the court is confronted with novel situations.

In both Canada and the United Kingdom, the courts rarely see cases of an outright refusal by Government authorities to comply with a judgment. Often the problem of

non-compliance only arises incidentally. This further complicates the search for precedents. At the beginning of the century the Privy Council considered whether an action *in rem* could be brought against a ferry boat owned by the Crown for payment of the costs of a rescue operation. The Judicial Committee concluded that the ferry was exempt from seizure. Relying on the principle by which "it is impossible to contend that the King can be impleaded in his own Courts," it concluded that "it is, therefore, impossible to maintain that the power of seizing a vessel belonging to the Crown can be exercised as against the Crown."[14]

The most important recent case is unquestionably *Franklin* v. *The Queen (No. 2)*. This dispute was part of the aftermath of Rhodesia's unilateral declaration of independence. Mr. Franklin held Rhodesian bonds for which he had not received a penny since 1965. At trial, he managed to obtain a favourable judgment which was to be executed "by the registrar or other agent of the Government of Southern Rhodesia having possession in England and Wales of moneys of the said Government ..." (*Franklin* v. *The Queen (Note)* 205). The registrar was in fact the Bank of England, and it could only return 41 pounds to the petitioner instead of the 219 pounds which had been awarded for unpaid interest. In the second case, Mr. Franklin proceeded by petition of right[15] to compel the Bank of England's head accountant to submit to a post-judgment examination. An appeal from a decision refusing this incident of compulsory execution was unsuccessful. Lord Denning dismissed the appeal on the grounds that the first decision (*Franklin (No. 1)*), was merely a declaration of right, something which "is not a mandatory order" [for the payment of money] but is declaratory of the right of the suppliant. "It has never had to be enforced by means of a writ of execution. It is always presumed that, once a declaration of entitlement is made, the Crown will honour it. And it has always done so. Furthermore the Crown is not a 'judgment debtor' in any sense of the words" (p. 218). Lord Denning's rationale very clearly strengthens the special immunity that the Crown enjoys. Because the Crown is always presumed to be a good debtor, reform of the immunity from execution rule is unnecessary.

Earlier precedents are to the same effect as *Franklin (No. 2)*. *Dominion Building Corporation* v. *The King* concerned a Canadian dispute in which the Crown in right of Canada was in breach of contract. The problem of compulsory execution is often raised quite sharply in contract litigation because the private individual who has contracted with the Administration seeks, above all, execution of the agreement (specific performance). Hence, the question arises whether orders for specific performance may be made against the Crown. In *Dominion Building Corporation*, the Judicial Committee excluded the possibility *proprio motu*: "It is no doubt true that an operative order for specific performance cannot be made against the Crown" (p. 548). But their Lordships attempted to overcome the difficulty by noting their jurisdiction "to make a declaration

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14. *Young* v. *S.S. "Scotia"* 505. The judge goes on to say (pp. 508-9):

> While, therefore, on the one hand their Lordships think that it was quite right to raise the question of the Crown's privilege in this case, they would deeply lament to learn that the Canadian Government, when the circumstances are brought to their attention, refused to give effect to the hearty recommendation of the Court below, which their Lordships desire emphatically to indorse and to repeat.
>
> Powerless to compel the Crown directly to remit an indemnity, the only alternative available to judges is expressions of sentiment.

15. As required by *The Colonial Stock Act, 1877*.

as to the right of the subject to specific performance if the circumstances justify it'' (*ibid.*). Garant concludes that [TRANSLATION] ''the courts may by declaratory judgment declare that the petitioner is entitled to specific performance'' (1985: 386-7). Nevertheless, a declaratory judgment provides no real promise of execution, because by its very nature it cannot be enforced. The fact that declaratory action cannot sustain execution process was, in fact, noted in *Franklin (No. 2)*.

Canadian courts have also shown great respect for the principle of immunity from execution. The leading case is still *R.* v. *Central Railway Signal*. The Central Railway Company sought by distress to take back many of the assets and materials of the Canadian National Chemical Works. These had been confiscated by Her Majesty for violation of the *Excise Act*. After noting that the effect of confiscation was to give the Crown ''the absolute property of the thing forfeited,'' Mr. Justice Duff quashed the seizure: ''[O]f course, no order can be made against the Crown in such proceedings in the sense in which an order can be made against a subject'' (p. 563). The court expressly held that the term ''proceedings'' encompassed the ''specific recovery of goods, recovery of land, ... the enforcement of contract, ... the enforcement of such a right as a landlord possesses in the goods of his tenant ...'' (*ibid.*). Mr. Justice Duff also cited Blackstone to the effect that ''no process of execution can issue against His Majesty or His Majesty's property from any of His Majesty's courts'' (p. 564), and endorsing comments by Maitland (Pollock and Maitland, 1968: 514), he added that: ''It has sometimes been said that this immunity of the sovereign from processual coercion ... [is] 'the grandest of his immunities''' (p. 564).

It is hard to join issues when a principle is stated so categorically. The tenor of the judgment might even be seen as implying that the court is the defender of the Crown's privileged status. Even today many judges remain just as convinced of the principle of immunity. In 1958, Mr. Justice Rand of the Supreme Court had no hesitation in stating that the idea of subjecting the Crown to the ordinary law ''is repugnant to the principle of immunity ...'' (*C.B.C.* v. *Attorney General for Ontario* 198). More recently, in 1976, Mr. Justice Mayrand of the Québec Court of Appeal concluded that [TRANSLATION] ''the sound administration of justice demands the respect ... of the prerogatives that our law accords to corporations or agents of the Crown'' (*Commission d'assurance-chômage* c. *Cour provinciale*).

The same year the Federal Court ruled clearly that Crown assets, specifically those of the Canadian Broadcasting Corporation, were exempt from seizure.[16] After first noting that ''the effect of any judgment against it can only be declaratory'' (p. 148) and not enforceable, Mr. Justice Addy added this important clarification:

> [I]t has long been established in case law that the Crown can only lose its prerogatives under an Act which contains a clear and precise statement to that effect, and that any Act to which a party attempts to ascribe such a result must be interpreted in favour of the Crown and against whoever alleges that it has renounced its prerogatives. (p. 149)

The presumption that legislation should be interpreted in favour of the Crown also shows up in cases dealing with garnishment of its employees' wages. Even though the

16. *Public Service Alliance of Canada* v. *C.B.C.* As authorized by a writ of *fieri facias*, property of a Crown corporation was seized following registration of an arbitrator's decision. The judge decided that the writ was void *ab initio*, the seizure was quashed and any executory proceeding also forbidden.

Garnishment, Attachment and Pension Diversion Act considerably modifies the extent of Crown immunity,[17] cases under the Act are still useful in explaining the origins of existing principles.

Relying principally on the fact that garnishees are "Crown servants," the courts have taken it for granted that public servants accede to the Crown's immunities. This attitude raises, on an individual level, the problem of Crown agency or Crown mandate.[18]

Some dissenting opinions from an earlier period might well have led to a different law today, but they have not been followed.[19] In the absence of an express provision to the contrary, exemption from seizure has remained the rule to this day. Some judges have proposed a rather feeble alternative, the declaration of right,[20] but since this recourse is merely declaratory, the problem of direct execution against the Crown inevitably recurs. In a significantly typical judgment (*Barre* v. *Fortin*), Mr. Justice Barbès of the Québec Superior Court refused to allow any seizure against [TRANSLATION] "the Sovereign's assets" because "no order aimed at forcing Her Majesty is valid in English law" (p. 139). The judge also made some particularly significant observations by way of explanation for the rule:

> [TRANSLATION]
> This proposition is based on the attributes of the Sovereign, who is only answerable to God. *Rex est vicarius et minister Dei in terra*. And Her Majesty's courts have no authority to give orders to her, even in civil matters. The jurisdiction of the Court is based on the existence of the authority to enforce it; but who can impose the effect of the exercise of authority on the source of that authority?
>
> It is because of the very authority of the Sovereign, of its dignity, which cannot suffer an equivalent or higher authority, that the Sovereign is immune from a court order. (*Ibid.*)

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17. In Québec the principle of garnishment against the Crown was admitted in 1875 (*An Act to render liable to seizure a portion of the salaries of Public Officers and Employees*). The legislator beat a retreat in 1897 in making [TRANSLATION] "salaries of public officers" (section 599.9 of the old *Code of Civil Procedure*) exempt from seizure. On this subject see *Perreault* v. *McCarthy*; *Lépine* v. *Gauthier*; *Gingras* v. *Vézina*; *Lovejoy* v. *Campbell*; *Lelièvre* v. *Baillargeon*; *Robinson* v. *Quinn and Casgrain*. This case-law is based on the principle that funds destined for public purposes, for example the payment of contract for the construction of fortifications, remain exempt from seizure: *Fitts* v. *Pilon*. See also *Shaw* v. *Bourget*; *Beauchemin* v. *Fournier*; *Evans* v. *Hudon and Browne*; *Crevier* v. *De Grandpré et Lamothe*; *Dame St-Amand* v. *Decelles*.

18. In *Fortier* v. *Cholette*, the court of appeal specified that it is [TRANSLATION] "basically the King who appears by means of his officer .... Unlike an individual, the Crown cannot be required to pay, out of the defendant's salary, the amounts necessary to enforce the judgment" (p. 517).

19. Even if in *C.N.R.* v. *Croteau* the Supreme Court did allow the validity of a garnishment order directed against the C.N.R., it was only a means of a literal construction of section 15 of the Act (S.C. 1919, c. 13) which has become section 44 of the *Canadian National Railways Act*. On the level of general principles, Mr. Justice Duff clearly noted "the inability of the courts to make an order against the Crown," and shortly afterward he added that "[t]he process involves no order against the Crown" (p. 388).

20. In 1935, Mr. Justice Bouffard of the Québec Superior Court suggested that garnishment was allowed against a minister of the Crown provided some formal requirements were respected, specifically proceeding by declaration of right: *Blanchet* v. *Blanchet*. He was careful to add that in such proceedings, any formula with a penalty for non-compliance was banished in favour of [TRANSLATION] "a simple prayer addressed to the minister of the Crown" (p. 545). See also *Boileau* v. *Boileau Ltée*.

Not all judges rely on this type of argument, even though their decisions usually confirm the principle of immunity.[21] In all too few cases, judges have rejected established theories (*Martin* v. *Martin*; *Re Kraw and Kraw*), and when they do inevitably they confront the principle by which a court cannot make a binding order against the Crown. In other words, to take an example, while the courts are prepared to hold that garnishment of a teacher's wages is not contrary to public order, they have not dared to question their lack of jurisdiction to issue orders to Her Majesty (*Royal Bank of Canada* v. *Scott*).

This study of the cases highlights an important point. Whether the issue is liability in tort or compulsory execution, the judicial arguments are often similar in nature. Not so long ago, a judge could say that no proceedings could issue against Her Majesty, apart from the recognized exceptions. Such arguments are consonant with the ideas of Blackstone, by which "no suit or action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him" (1765: 235). Today, to justify refusal of compulsory execution against the Crown, judges still rely on this type of argument. The Crown's special immunity from execution is, consequently, nothing other than a contemporary manifestation of the general immunity it previously enjoyed. The reforms undertaken in 1953, with the enactment of the *Crown Liability Act*, and in 1970, with the *Federal Court Act*, only constitute exceptions to the basic principle of immunity of Her Majesty before the courts. If public authorities have been more or less forced to adapt to a scheme of partial liability, the same cannot be said with respect to compulsory execution, where courts have rejected any liberalization of the rule. This immunity, then, is merely a holdover from a period when the constitutional bases of judicial power were still poorly entrenched with respect to the Crown, the latter institution being too closely associated with the Monarch as an individual.

The rhetoric of the cases shows the extent of the psychological and legal obstacles in the way of reforming the principle of immunity. Until it is acknowledged that the real beneficiaries of this immunity are simply the Administration and the Government, informed debate is unlikely. In direct confrontations with the Crown, courts will not reverse longstanding constitutional principles. The judge's position is most delicate since he is not at liberty freely to reassess principles unchanged since the twelfth century! Immunity, as conceived by medieval jurists and theologians, remains the rule, and any exceptions are, at most, concessions or adaptations that do not challenge its very existence. Given this context, it is hardly surprising that individuals have difficulty pursuing execution remedies against the federal Administration.

Section II: Absence of Legal Safeguards relating to the Execution of Judgments

Immunity from execution is both varied and complex, resting as much on judicial attitudes as on official enactments. Yet the Crown's immunity from execution is of no great moment if execution creditors have other recourses to ensure compliance with

21. *H.F.C. of Canada* v. *Dubois*; *Hamel* v. *Théorêt* is only an isolated case. Likewise, for the English-Canadian provinces, see *Re Hamill and C.N.R.*; *Bonus Finance Ltd.* v. *Smith*.

judgments rendered. Unfortunately, these alternatives do not really give the individual an adequate remedy for direct non-compliance by the Administration. The judgment creditor's situation is even more precarious because, even if alternatives existed, they might be rendered ineffective, given the complexity of different types of non-compliance. To gain a realistic appreciation of the effectiveness of alternatives to compulsory execution, it is necessary to examine strategies by which the Administration can deny or reduce the scope of a judgment.

I. *The Phenomenon of Non-Compliance with Judgments*

The phenomenon of non-compliance in administrative law does not assume the same significance as in its private law analogue. In the former case, the party refusing to comply with a judgment typically is the State itself. Therefore the problem must be approached from a completely different standpoint. Even if public authorities are execution debtors, they are not subject to the ordinary legal regime applicable to debtors. Indeed, to a large extent public authorities may unilaterally shape this legal regime in individual cases. That is, they have the power to frame the issue in dispute, either by consenting to the application of pre-existing legal rules to a fixed fact pattern, or inversely, by changing either or both the law or the facts so that litigation no longer serves any purpose. Consequently, non-compliance in administrative law is a complicated and diffuse phenomenon.

A. Limits of the Existing Legal Regime

At an early stage in Continental administrative law, particularly in France, legal theorists began to study non-compliance with judgments by the Administration (Defert, 1910; Barthélemy, 1912; Boulard, 1932; Laurent, 1941; Tari, 1933). Numerous cases of non-compliance led them to question whether orders of the Conseil d'État actually had executory force (Braibant, 1961; Lefas, 1958; Rivero, 1951; Montané de la Roque, 1950). Indeed, the French administrative judge [TRANSLATION] "with respect to the Administration had neither the power of injunction, nor of substitution, nor the possibility of compulsory execution process" (Weil, 1952: 58). The principle of the independence of the Administration meant that the judge could not directly compel the Administration to comply with final judicial orders. In effect, he could only pressure the Administration by imposing fines, awarding damages, or by systematically vacating (or quashing) Administration countermoves. Within such a context, it is hardly surprising that some judgments were simply ignored by the Administration in the name of the public interest and the sound operation of public services. These problems were apparently resolved by the major reform of July 16, 1980, a reform to which we shall return later.[22]

In systems based on the English constitutional tradition, the Rule of Law and the principle of separation of powers ought to rule out such administrative freedom. In its

22. See *infra*, the discussion in Chapter Two.

logical sense, the Rule of Law implies a hierarchy among State organs (Brun and Tremblay, 1982: 480). Thus, administrative action is normally subject to judicial review. In this tradition, the authority of courts is often considered an accomplished fact, as the comments of some judges indicate. In *MacQuarrie*, Mr. Justice Gillis refers to Fry's praise of the declaratory judgment in the area of specific performance but Fry adds, "although there might, perhaps, be some difficulty about enforcing such performance, in the unthinkable event of the Crown refusing to comply with the judgment" (1911: 65). Yet this "unthinkable event" is not all that improbable, if a judgment orders public authorities to suspend major public works. For example, in 1973 in the James Bay case, the Québec Government was able to avoid the consequences of the judgment by Malouf J. by filing an appeal. In Québec law, an appeal by the Crown always suspends the decision appealed from (*Société de développement de la Baie James* c. *Kanatewat*). If hypothetically the judgment had been final, it is hardly likely that the Government would have stopped construction, on which several hundred million dollars had already been spent. Considering the financial cost of certain undertakings, or their political importance (for example, nationalizations), the Administration may well encounter situations where it has no other choice but to refuse to execute a judgment. On occasion courts have foreseen this possibility, as the *Société Asbestos Ltée* case shows. Seized with an application for an interlocutory injunction against the Société nationale de l'amiante, Mr. Justice Lajoie stated that it would be improper to refuse an injunction on the basis that the Government might eventually refuse to obey the court's order. He considered that, were the Government to do so, its actions would [TRANSLATION] "weaken the foundations of the legal system that governs our society" (p. 350). He believed that [TRANSLATION] "the legislator and the Government still consider themselves bound by the decisions of the courts, if not by coercion at least morally and legally" (*ibid.*). Thus conscious of the real limits of its authority, the court was driven to invoking fundamental constitutional principles in response to a perceived threat of non-compliance.

Despite the genuine or presumed good conduct of the Administration, rules of Canadian administrative law do give considerable latitude to public authorities as to how they will comply with judicial decisions. In other words, the current system is problematic and could well lead to cases of non-compliance if there were a major disagreement between Administration and judiciary. Yet some jurists still presume the contrary. In *Franklin (No. 2)*, Lord Denning noted simply: "It is always presumed that, once a declaration of right is made, the Crown will honour it. And it has always done so" (p. 218). In English law, this serene and almost mythical portrait of the good conduct of the authorities has been sharply contested by Harlow (1976). She observes that, without resorting to pure and simple non-compliance, the Administration may still deprive a judicial decision of its essence (*id.*: 117). In such cases formal compliance is only a hollow gesture, [TRANSLATION] "the Administration twisting the decision and making it practically inoperative by one of the many gambits to which it is privy" (Fayolle, 1926: 32). She concludes, after studying the situation on both sides of the Channel, that "experience in both England and France suggests that recognized techniques exist for the circumvention of court orders" (1976: 117). In other words, the possibility of administrative runaround puts not only the usefulness, but also the very point of judicial remedies, into question.

Canadian commentators have begun to show some interest in this problem (Lemieux, 1983: 7-25). Sometimes the individual may only win a "moral victory" over a public authority, because the latter will [TRANSLATION] "take substantially the

same decision again, after having corrected the irregularities that led to it being quashed'' (*ibid.*). But even granted these more subtle diversionary techniques, direct non-compliance also remains a very real possibility (see the *MacQuarrie* case). The problem of execution of judgments must be taken seriously, not only because individuals lack certain fundamental safeguards but also because questions arise concerning the appropriateness of maintaining immunity from execution in its present form.

B. Types of Administrative Response

The Administration may deploy a variety of tactics to counteract a court decision. These include both overt resistance where public authorities either ignore or defy a judgment, and covert or more discrete responses (passive resistance), such as incomplete or delayed execution, or even ratification of the vacated act.

1. Overt Resistance

In France, direct refusals to comply with judicial decisions are relatively more frequent than in other Western countries. Usually, it is minor officials or mayors of small communes who ''rebel,'' typically out of pride or electoral opportunism (Weil, 1950: 384). But sometimes even central authorities refuse to comply.[23] Quite often the Administration systematically refuses to reinstate public servants who have been illegally dismissed (Braibant, 1961: 61; Lefas, 1958: 84). Here one frequently encounters genuine duels between the courts and the Administration — a war of attrition fought over the systematic repetition of decisions to quash (Fayolle, 1926: 37).

But the situation in France should not be caricatured. The key point is that political considerations may interfere with the voluntary execution of a judicial decision. This danger exists today in Canada. The Crown is truly independent of the judiciary, in a manner analogous to that reflected by the French principle of administrative independence from curial decisions.[24]

According to Montesquieu's analysis, the various functions of the State are distinct from, and independent of, each other. This is particularly true of the courts. [TRANSLATION] ''In other words, the principle of separation of powers which, as we have seen, is meaningless under our constitutional system with respect to legislative and Executive functions, takes on some significance with respect to the judicial

23. The famous *S.A. des Automobiles Berliet* case is an example, in which, after an initial decision of the Conseil d'État dated July 22, 1949, the entire Government replied a week later with an interministerial order directly contradicting the decision rendered. On December 28, the Conseil d'État again took the same decision, severely censuring this defiance of *res judicata*. C.E. July 22, 1949, Rec. 368; C.E. December 28, 1949, Rec. 579; S. 579; S. 1951.3.1 (Concl. Guionin, note by Mathiot); Note by Weil, 1950.

24. In France, this principle is linked to the historical circumstances at the time of the creation of the Conseil d'État, this institution gradually becoming removed from the Administration itself. Hence the prohibition for the administrative judge [TRANSLATION] ''to behave as an administrator.'' As a result, the judge cannot order the Administration how to behave, the latter being free to submit voluntarily to the requirements of legality. See Chevallier, 1970 and 1972.

function'' (Brun and Tremblay, 1982: 513; see also Humphrey, 1945-46). Judicial and administrative functions cannot be confused, even if there are points where they overlap, and even if their decision-making procedures are becoming increasingly similar (Brun and Lemieux, 1977). The separation of powers doctrine means that the courts cannot directly usurp administrative discretion either by taking a decision on the merits of a given case, or by ordering performance of specific acts. To suggest the contrary would imply a confusion of functions and judicial interference in the internal operation of services (Artur, 1900). The role of the judge is to determine whether the law has been broken, and if so, to sanction its violation by quashing an impugned act. He may command the Administration to respect the Rule of Law, but he cannot dictate the latter's conduct, or even sanction a refusal to comply with a judgment by dictating the specific measures which the Administration must take.

Where there is overt resistance by public authorities, courts nevertheless possess formidable power. They may quash any act that directly violates the substance of the first judgment. If the Administration intends active and overt non-compliance, its defeat would often be inevitable because courts may quash, or at least seriously limit, non-complying behaviour. On the other hand, the Administration may more effectively resist through passive non-compliance since the courts have no meaningful sanction for non-feasance.[25]

2. Passive Resistance

Passive resistance may take three forms. First, the Administration may take its time complying with a judicial decision; in general no time-limit for execution is imposed. An even more effective gambit is to leave the judgment creditor with the impression that compliance will be forthcoming when it really has no such intention. Unlike non-compliance through ratification, here the Administration is simply adopting a common technique of private law litigation. Should more be required from the State on the basis that it should always be a good debtor? Should a reform be limited only to suppressing administrative practices? Assuming that we challenge the State's entitlement to certain special immunities, it can also appear questionable to subject it to discriminatory treatment. Finally, the State may try to outsmart its creditor just like any private law debtor.

(a) *Delay*

Although some delay is inevitable in any system of adjudication, it also results from external causes. Like any private person, the Administration may delay execution of a judgment by appealing a decision. As there can be no provisional execution against the Crown, an appeal is always an effective dilatory proceeding. Any lawsuit involving the State may take considerable time, in particular because of the financial resources of the State.

However desirable this may be, it is difficult to reform the law to prohibit proceedings which have no purpose other than to delay or inconvenience the opposing

25. This resistance above all takes the form of prolonged silence. As Delvolvé notes, [TRANSLATION] ''rarely does the Administration take the initiative in outright refusal to comply with a judgment: not only does it take no initiative to execute, it takes no initiative to say that it will not'' (1983-84: 121).

party. Everyone is entitled to his day in court, even if this entails according Canadian courts the right to impose fines or similar sanctions on parties who take abusive proceedings, as has been done in France.[26] Unfortunately however, overly delayed verdicts or decisions to quash are often useless, especially where the issue in dispute has become moot. As Braibant correctly points out, [TRANSLATION] "the danger of non-execution increases with time" (1961: 59). After several years have passed, the final judgment is often too late for the plaintiff to obtain any real satisfaction. For example, if a public servant has been wrongfully dismissed, how is it possible several years later for him to be properly reinstated into an interrupted career? In other cases delay may find the Administration in a position from which it cannot retreat, given the existence of vested rights and the prohibition on giving retrospective effect to certain acts. Public authorities inevitably have time on their side.

Even assuming that the courts decide a dispute within a reasonable time, the Administration may be slow to respond to the judgment rendered (Garant, 1985a: 952). For *bona fide* budgetary reasons, or even because of bad faith, it may procrastinate.[27] Full execution of a judgment may, therefore, take considerable time, during which the individual has no recourse. Because the Administration has great latitude in arranging the practical details of execution, procrastination invites incomplete execution.

(b) *Incomplete Execution*

Incomplete execution often results from a rather legalistic approach to judgments by public authorities. For example, in the case of a public servant who has been wrongfully dismissed, the Administration may give the impression of complying with the judgment by reinstating the person in the position or function previously held. But if it fails to assign him any tasks or responsibilities, or reduces his salary, it has complied with the judgment that quashed the wrongful dismissal only in a technical sense. Where courts simply declare that an act is illegal without specifying a remedy, often the Administration will interpret the judgment to suit its wishes. Unless the court orders *restitutio in integrum* or some form of compensation, the form of administrative execution may vary considerably. Indeed, public authorities may claim they misinterpreted the true intent of a judgment when declining to draw the remedial conclusions which it necessarily implies. In other words, respect for the letter of judicial decisions is really only a preliminary step toward full execution.

The Administration may avoid full compliance with a court order in ways other than declining to respect the spirit of the judgment. It may simply comply with only part of a judgment. For example, it may grant monetary compensation to a plaintiff while refusing to respect a mandatory or prohibitive injunction. On the pretext that it remains the final arbiter of how to comply with judicial decisions, the Administration may weigh the appropriateness of some measures ordered by the court against other administrative requirements, and decline to execute a judgment fully.

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26. See Richer, 1983. In Canadian criminal law, the judge may order a stay for abuse of process (*R.* v. *Jewitt*). Such a power is only permissible in the context of accusatory proceedings (criminal matters) and not contradictory proceedings (civil matters).

27. The *Rosan-Girard* case, C.E. May 31, 1957, Rec. 355 (Concl. Gazier); *G.A.* 1978, 476; *D.* 1958.2.152 (Note by P.W.). See also Harlow, 1976: 118.

3. Administrative Alternatives to Non-Compliance

Thus far, Administration resistance has been presented as the principal impediment to full execution of judgments. Yet other, more sophisticated means exist to neutralize a judgment: the Administration may simply act to prevent a judgment from producing any real effect, either by amending the law or by changing its own practice. Specifically, it may do this by ratifying or re-enacting what has been impugned. Or it may reach a similar result by unilaterally altering the situation of the parties.

(a) *The Practice of Ratification*

Ratification is a legislative response which allows the Administration to use Parliament to regularize a challenged administrative act. It enables [TRANSLATION] "the Administration to extricate itself legally from the consequences of the order to quash or a declaration of illegality by the court" (Lefas, 1958: 86). In France, this practice takes the form of a statute that retroactively validates various administrative acts that have been quashed by administrative tribunals for want of jurisdiction (Perrot, 1983; Israël, 1981: 11). Commentators have severely criticized this practice.[28] The use of retrospective statutes can regularize acts whose legality is doubtful or contested retroactively to the date when those acts were performed.[29]

Although the use of ratification is widespread in France, English-speaking countries tend to resort to the technique of *ex post facto* annulation rather than to "validatory practice" (Harlow, 1976: 122). In this sense, it takes the form of a reaction or a response by the authorities to a judicial decision. The *Burmah Oil* case is a well-known example. In 1942, during the Japanese advance into Burmah, the British military authorities ordered the destruction of the Burmah Oil Company's installations, fearing that they would fall into enemy hands. In 1961 the company sued for compensation. Even though the destruction was ordered pursuant to an exercise of the royal prerogative, the Privy Council found for the plaintiff on the basis that "there is no general rule that the prerogative can be exercised, even in time of war or imminent danger, by taking or destroying property without making payment for it" (p. 102). Parliament reacted immediately by adopting *An Act to abolish rights at common law to compensation in respect of damage to, or destruction of, property effected by, or on the authority of, the Crown during, or in contemplation of the outbreak of, war* (1965, c. 18). Thus, despite having its right to compensation recognized by the country's highest court, the plaintiff received absolutely nothing.

English law provides other examples that are closer to the French practice of ratification. Among various statutes enacted by the British Parliament to ratify illegal acts committed by British troops stationed in Northern Ireland, the *Northern Ireland Act, 1972* (1972, c. 10) is particularly striking. On February 23, 1972, a Northern Irish

28. Braibant, 1961: 64; Lesage, 1960: 318; Auby, 1977. For recent examples of validation, see Pacteau, 1983. Also by Pacteau (1985: 343), see his comments on "La remise en cause législative de la chose jugée: les validations législatives."

29. On two occasions, the *Conseil Constitutionnel* has recognized the constitutionality of such proceedings (Decision No. 80-119 DC of July 22, 1980; *A.J.D.A.* 1980, 480 and Decision No. 85-192 DC of July 24, 1985; *A.J.D.A.* 1985, 485 (note by J.J. Bienvenu)). In the second case, the proceedings were audacious, to say the least, because the individual decisions at the basis of the dispute were validated even before they had been taken!

court declared the regulations conferring special powers on British troops to be illegal (O'Higgins, 1972). Reacting with remarkable speed, during the night of February 23/24 the British Parliament enacted a statute making retroactively legal the powers therein conferred on its soldiers, thus removing any likelihood of a claim for damages. Nearly a century earlier, Dicey attacked similar practices (1911: 84). Today one may continue to ask whether this potential escape-hatch serves the proper operation of the rules of administrative law.

Legislative ratification is also practised in Canada (Lemieux, 1983: 7-22). In 1973, the Supreme Court faced such a problem in the *Woodward* case. The British Columbia Department of Finance had established the amount of succession duties to be paid by the Woodward estate according to the *Succession Duty Act* of British Columbia. As this amount was based on an assessment which interpreted the nature of the relationship between the testator and a charitable organization, the executors challenged the Department's decision before the courts. However, the dispute quickly became moot when the legislature enacted a statute which vested an unfettered right of interpretation in the Minister.[30] The Supreme Court upheld the statute, but noted (p. 127) that "the latter part of this provision is unlike any other which has previously been considered by the Courts."[31] But unfortunately the Supreme Court stated that "it is not the function of this Court to consider the policy of legislation validly enacted" (p. 130), something that amounts to a rather narrow conception of the principle of Parliamentary sovereignty.

However, this phenomenon of *a posteriori* ratification is not limited to administrative law. It has become a general legislative practice that is not confined solely to administrative operations. A statute may suppress or reduce the effects of a judgment without any administrative act necessarily being questioned. This is shown by a 1953 case dealing with the interpretation of an Alberta statute (*Western Minerals Ltd.* v. *Gaumont*).[32] Once again, the Supreme Court accepted a *fait accompli* without protest, noting (p. 367) that "[t]he *Sand and Gravel Act* is *intra vires* of the Provincial Legislature and is declaratory of what is and has always been the law of Alberta, and so applied to the present litigation and is fatal to the appellants' claim."[33] Yet the

30. In 1970, section 5 of *An Act to Amend the Succession Duty Act* stated that:

> For the purpose of subsection (1) the Minister, in his absolute discretion, may determine whether any purpose or organization is a religious, charitable, or educational purpose or organization and the determination of the Minister is final, conclusive, and binding on all persons and, notwithstanding section 43 or 44 or any other provision of this Act to the contrary, is not open to appeal, question, or review in any Court, *and any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons*. [Emphasis added]

31. Specifically, it concluded that "those words gave statutory ratification to all determinations of the Minister made under s. 5(2), as amended, even though such determination would, in the absence of the provision, have been valid" (p. 129).

32. Pursuant to an Alberta statute dating from 1942, the *Land Titles Act*, the appellant company held a claim reserving ownership "of all mines, minerals, petroleum, gas, coal and valuable stone in or under two certain quarter sections of land of which the respondents Gaumont and Brown were the respective owners under the Act of the surface rights." The parties disputed the ownership of the sand and gravel, even if the statute probably allowed it to be included in minerals covered by the claim. The trial judge ruled in favour of the mining company on this point. However, the effects of this judgment were literally wiped out by the enactment of the *Sand and Gravel Act* of 1951, which reserved exclusive ownership of the sand and gravel to the owner of the land surface.

33. Some judges have even adopted a firmly conciliatory attitude, by giving this statute a declaratory scope. According to Mr. Justice Cartwright, "its provisions indicate an intention not to alter the law but to declare what, in the view of the legislature, it is and always has been" (p. 367).

Ontario Court of Appeal objected to an Ontario statute in 1935, stating that certain contracts "[are hereby] declared to be and always to have been illegal, void and unenforceable as against the Hydro-Electric Power Commission of Ontario" (p. 798); the enactment also had a privative provision in order to block any challenge (*Beauharnois Light, Heat and Power Co.* v. *The Hydro-Electric Power Commission of Ontario*). Their Lordships refused to allow this interference with the judicial system, declaring such provisions to be null and void and invoking the fact that "the Legislature could not, by enactment of adjectival law, preclude the Courts of Ontario from so declaring [it *ultra vires*]" (p. 821). When important rights are at stake, the courts may therefore be quite strict in construing the formal will of the legislator. As the courts enjoy considerable independence, it is a pity that they have not been more critical of legislative ratification.

This brief review has focussed on a real problem. The individual is in a precarious situation if legislative or administrative intervention, before or after a judgment, may deprive him of the benefit of a favourable or potentially favourable decision. Even if in some circumstances ratification may be indispensable to avoid a stream of orders to quash,[34] it should not be allowed to impeach rights that have already been judicially recognized. That is, ratification should not be deployed as a recourse against a judgment already rendered. Here it is a case of reversing the old saw by which *justice should not only be done, but seem to be done*. The judicial process should be more than simply an appearance, a formal artifice without real significance, offering the individual no more than a moral victory. This danger is more than a mere research hypothesis, because by re-enacting what has been impugned, the Administration can, in fact, eliminate the effects of a judgment.

(b) *Reconfirmation of a Vacated Decision*

In the area of individual administrative acts, for example licences, permits and authorizations, the individual may easily lose the benefit of a judgment which has just corrected an illegality in the decision-making process. If the Administration can render the same decision against the plaintiff[35] following an order to quash, in the end, he obtains nothing more than provisional success, with the final outcome — an unfavourable one — never really in doubt. Reconfirmation thus becomes an effective way for public authorities to side-step a judgment, a genuine subterfuge described by Harlow as "the cynical flouting of the judgment of a superior court by the administration" (1976: 121). On the other hand, it can be argued that there is nothing

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34. [TRANSLATION] "The repercussions of a decision to quash upon decisions that are themselves regular, occurring after the fact but affected by the illegality of the act that has been quashed, may lead to such complicated consequences that there is no other way than to proceed by legislative ratification, in order to avoid problems that are even more serious than the non-respect of *res judicata*" (de Baecque, 1982-83: 184).

35. This is not the only possible aftermath of the quashing by the courts of an administrative act. Based on the nature of the act that is quashed, and also on the grounds for it being quashed, the Administration may have nothing to do, or on the contrary, may be required to act by various material and legal measures, or may be required to take the same decision in accordance with various conditions. Without wishing to deny the complex and unpredictable nature of the consequences inherent in any decision to quash, here we are principally concerned with the final possibility. On the issue as a whole, see particularly Massot, 1979-80.

reprehensible about public authorities correcting simple errors of form by again taking the decision which the merits of the case require.

Whether occasional or widespread, this practice has managed to weaken the scope of two classic precedents of administrative law. In *Roncarelli* v. *Duplessis*, the petitioner was owner of a Montréal restaurant. He was denied his liquor licence in 1946 solely because of his membership in a religious group. He sued for damages, citing the illegality of the revocation of his licence. In 1959, thirteen years after the events took place, the Supreme Court ruled in his favour, declaring that discretionary powers had been exercised in bad faith. Roncarelli never got his licence back. All the Québec Liquor Board had to do was not refer to his religious beliefs in subsequent refusals. It was enough, then, to re-enact the impugned decision while at the same time correcting the cause of illegality. The Supreme Court was not empowered to declare Roncarelli to be entitled to a permit, for in the context of a claim in damages this would be to rule *ultra petita* (the action was against Duplessis). As exemplary as this decision may be, it shows that the Administration often has the last word!

The *Padfield* case is even more troubling. The *Agricultural Marketing Act, 1958* (c. 47) required the British Minister of Agriculture to set up a committee of inquiry to examine complaints from groups of producers. Despite protests from milk producers in southeast England about the effects of "milk marketing schemes" on their financial interests, the Minister peremptorily refused to form a committee to study the merits of the complaint. Although the Minister had discretion in pursuing the purposes of the Act, the court nevertheless considered that he could not ignore formal requirements of the Act. Following this decision, the Minister formed a committee to hear the petitioners but it dismissed their application immediately. Commentators concluded: "The remedy had proved illusory; the same decision could be reached with only nominal deference to the court, and the waste of time and money entailed is a deterrent to future complainants" (Harlow, 1976: 120).

The respect of formalities should not therefore create false hopes. Although the Administration may change its mind, there is a considerable likelihood that it will reach substantially the same decision upon a reconsideration. If its power is discretionary, it is unlikely to reverse an initial decision which is consistent with its overall policy approach. The individual only obtains a Pyrrhic victory.[36]

The *Nicholson* case is an excellent illustration of this type of problem. This lengthy legal saga ended without the appellant being reinstated as a police officer. He had been dismissed by an administrative committee (the Haldimand-Norfolk Regional Board of Commissioners of Police) following an urban reorganization whose consequence was a reduction in police personnel. He had been given no hearing prior to his dismissal. In a majority decision, the Supreme Court considered that Nicholson had been dismissed illegally because he "should have been treated 'fairly' not arbitrarily" (p. 324). Anxious to respect the court's verdict, the committee then notified Nicholson that a full hearing would be held in order to rule on his case. The same committee also sent him a supplementary letter with eleven reasons for dismissal. Nicholson was obviously headed for a new dismissal, but this time the formalities were

36. The victory is all the more relative, because the administrative act whose quashing he has obtained will nonetheless have produced material and legal effects since its issuance. As Massot has pointed out, [TRANSLATION] "even though the act that has been quashed is entirely 'erased,' the judge cannot prevent it from producing some effects, sometimes even all of its effects, and only in science fiction can we go back in time" (1979-80: 116).

to be respected![37] Even if it may suffer some reversals because of formal or other procedural errors, the Administration is almost sure to win on the merits, above all where its evaluation is discretionary.

In principle,[38] public authorities are required to reinstitute proceedings that the courts declare to be merely defective as to form. In this light, the phenomenon of reconfirmation seems more benign: [TRANSLATION] "This attitude cannot be criticized, to the extent that the author of the decision fully respects the rule of law" (Lemieux, 1983: 7-25). Nevertheless, even if required by the Rule of Law re-enactment may eventually lead to abuse. In *Padfield*, the Minister substantially ignored the judicial decision by refusing to proceed with a serious study of the grievances presented by the milk producers. Repeating the same act was not enough, as he was also required to respect substantive guarantees in connection with his decision. In other words, what is important is the reasons for quashing and the nature of the Administration's power. If the error is purely one of form, public authorities may easily reach the same result after holding a new hearing that respects all procedural and substantive requirements. Simple reconfirmation of an impugned decision is only questionable if substantive requirements have been ignored.

But reconfirmation is still troubling. It is eloquent proof of the serious limitations on judicial review. If judicial review only addresses errors of form, the petitioner can hardly expect a meaningful result on the merits of his application. The administrative act that has been vacated by the judge is merely replaced by one that respects the requirements of formal legality!

Consideration might be given to a new principle of review by which public authorities cannot encroach upon rights already recognized by the courts (more specifically, the right to an honest and fair reconsideration of all elements involved in taking the decision). This would link the formal and substantive factors which are the basis of any decision-making process. Of course such a safeguard only contemplates matters of law, and not the factual issues which may be at the root of a dispute. In the meantime, the facts at issue may evolve in such a way as to compromise re-establishment of legality.

(c) *Unilateral Changes to the Circumstances in Dispute*

In much litigation, the mere passage of time may totally jeopardize the plaintiff's position. This problem may well be aggravated by the other party who multiplies

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37. See *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*.

38. Other problems may also arise. The individual may eventually face a new refusal following a change in the provisions applicable to his case. Between the initial decision, which is quashed, and the second, the time-lapse can be considerable. In fast-moving fields such as urban planning and social affairs, the law changes quickly and the individual may no longer provide what was initially expected. Is the Administration then required to apply the law in force at the time of the initial decision or instead to apply the new provisions? Under such circumstances, may a judgment's scope be retrospective? Should the judge apply the law in force at the time of the initial application, of the introduction of the lawsuit or of the day the judgment is rendered? Without attempting to answer these complicated questions, we find it worth noting that normally the Administration is bound to apply existing law to any new application, unless the contrary is provided for by law. Here is the problem: When an act that has been quashed is taken again, is the individual considered to have made a new application? In *Nicholson*, Mr. Justice Linden replied in the negative.

dilatory measures, or even worse, acts in such a way as to deprive the final judgment of any effect.

The Administration may irremediably compromise the replacement of the other party in its original position. This is all the easier where it is identified or associated with the Crown, because it enjoys immunity from provisional execution. The most striking example of this is the James Bay case, where ongoing construction work pre-empted any potential effect of a final judgment favourable to the Amerindians.

The seriousness of this problem can be seen in at least one recent event: the last judicial echoes of the Mirabel expropriations, which may eventually lead to a political settlement. Three expropriation victims challenged unnecessary expropriations by federal authorities. Despite this judicial challenge, the Canada Land Corporation (C.L.C. — Mirabel) continued to reconvey, by sale or lease, excess land that had been expropriated. In December 1983 it even undertook an advertising campaign, clearly jeopardizing the efforts of the plaintiffs to have their land returned to them. They alleged that such reconveyances would make the issue in dispute moot.

An interlocutory motion enjoining the sale was filed in the Federal Court. At trial, the judge admitted that were he to deny the injunction, the lands could be resold.[39] Yet, the motion was dismissed. On appeal the issue was framed in analogous terms: "[T]he appellants' remedy would be illusory if, following the sale of the lands, it becomes impossible for them ever to recover their property" (p. 870).

A majority of the Court of Appeal nevertheless upheld the ruling of the Trial Division. Although Mr. Justice Pratte noted that "this appears to be a case in which the *status quo* should be maintained while the action is pending" (*ibid.*), the Crown's immunity to injunction still prevailed. For Mr. Justice Hugessen, who dissented, "the unequal strength of the two parties involved is such" that he would make an "order directing the respondents not to sell the land ... until the final judgment" (p. 872).

Thus, there is no effective recourse against the State when it changes a situation in dispute, as almost no exceptions to the rule of absolute immunity exist. There is very real risk that changes to the factual undertones of a dispute will induce plaintiffs to seek an out-of-court settlement rather than judicial recognition of existing rights. In such negotiations, the initial object of the lawsuit becomes moot. And in the resulting struggle the State is invariably the easy winner.

The problem addressed here is difficult to resolve because the Administration may legitimately plead the imperatives of public interest and ongoing operation of public services. The cruise missile case is only one of many where national security has been invoked so as not to interrupt experiments with new technology (*Operation Dismantle* v. *The Queen*). On the other hand, the individual may have a legitimate interest in forestalling enforcement. Under present law the individual has no meaningful safeguards, and this gives litigation a hollow ring. In the name of some abstract administrative ethics, should the Administration be required to respect the rights of third parties? This amounts to submitting the Administration to a higher morality on the pretext that it is not merely acting according to purely private interests. If the State

39. "What would happen to this action if I did not grant the interlocutory injunction? That would definitely put an end to the matter, at least with respect to the remedy sought, in that the lands would be resold, thereby making it impossible for the plaintiffs to be declared the owners of these lands and removing the basis for the application for a permanent injunction" (*C.I.A.C.* v. *The Queen* 6-7).

is presumed to be a good debtor, should it also behave as a good pleader? In addition, it is always possible to argue that the State, like any other private party, may use extrajudicial pressure tactics. Is this not the ultimate consequence of equality before the law — the right of everyone to hit below the belt?!

These conflicting arguments are hard to reconcile. Moreover, other factors particular to the litigation, specifically the real purposes pursued by the Administration, may be relevant. The interests of the Administration and of the State's various identities lie camouflaged behind the concept of the Crown. An in-depth examination of the nature of administrative action, therefore, must precede proposals for reform. This examination will be undertaken in Chapter Two, Section II: *The Reality of Modern Administration*.

II. *The Ineffectiveness of Alternatives to Compulsory Execution*

Non-compliance can be a problem for execution creditors in two ways. Besides direct non-compliance supported by Crown immunity, there is a variety of administrative practices which achieve the same result. The question here is whether execution creditors have effective remedies against non-compliance with judicial decisions. A few do in fact exist, suggesting that the individual has effective means to achieve an acceptable degree of execution. Some of these are essentially passive, such as pleading *res judicata* or seeking declaratory judgment. Others imply a more active contestation, as in the case of injunction and contempt of court. Despite the apparent potential of these remedies, however, closer examination reveals their limits in securing compliance with judicial decisions.

A. Passive or Non-Executory Remedies

The plea of *res judicata* and the declaratory judgment can be characterized as passive in nature even though the creditor who wishes to invoke them cannot remain inactive, particularly in the case of the declaratory judgment. While the declaration requires the plaintiff to bring a new action, it remains fundamentally passive, because it does not generate executory sanctions or give rise to debtor coercion. In principle, public authorities must comply with declaratory judgments, just as they are morally bound to respect any judicial decision. But since immunity from execution process is the problem to be overcome, the declaration is seriously compromised.

1. *Res Judicata*

Res judicata describes the principle by which, once a judgment is rendered, the legal relationship of the parties described by that judgment is not open to challenge. The stability of legal relations demands that once judgments have become definitive

they cannot be challenged in collateral proceedings.[40] *Res judicata* seems to be usually invoked as a defence at the beginning of a new lawsuit where the cause of action is based on questions of fact and law previously settled by the courts. In Québec law, this defence takes the form of a bar to action, which must be raised as a preliminary objection before pleading on the merits (*Code of Civil Procedure*, s. 165.1). To succeed, it must meet the requirements of the rule of the three identities: subject-matter, cause and parties (Nadeau and Ducharme, 1965: 469; Nadeau, 1963). In common law, the doctrine of *res judicata* is usually considered as a type of "estoppel."[41] To apply, the defendant must not only show that "the subject-matter in dispute was the same in the second suit" and that the judgment invoked "was conclusive to bind every other court," but also that the plaintiff launching the new attack has omitted by his own negligence to raise the elements of fact or law in the first lawsuit that he invokes in the second (*Halsbury*, 1983, Vol. 16: 1028). *Res judicata* is a presumption *juris et de jure*, the judgment in question being deemed [TRANSLATION] "the full and entire truth" between the parties (Nadeau and Ducharme, 1965: 447).

The principle of *res judicata* has two defects as a means of ensuring compliance with judgments. First, it is raised as a defence and not as part of an active contestation. Unless the Administration attempts to relitigate an unfavourable judgment, the execution creditor who hopes to use this principle to force a recalcitrant Administration to respect a judgment in his favour has only extrajudicial resources at his disposal. For example, he may attempt to pressure the Administration, perhaps even threatening new lawsuits. In such a context *res judicata* does not really function as a legal remedy.

Secondly, the effect of a plea of *res judicata* upon the Crown is not clear. In theory, "the King is not bound by fictions or relations of law, or by estoppels" (Lyman, 1978; Chitty, 1820: 381). This is true for both classes of estoppel, "estoppel by record" (based on forms of evidence or claims within the other party's pleadings, and thus internal to the trial) and "estoppel by deed or estoppel in pais" (based on the other party's conduct prior to the proceedings).[42] Since "the doctrine of *res judicata* is a branch of the law of estoppel" (*R.* v. *St-Louis*), it may be that the Crown is not bound by the principle.

Not all authors support this deduction: "although Her Majesty is not bound by estoppel, she is bound by the principles of *res judicata*" (*Canadian Encyclopedic Digest*, 1985: 141; Mundell, 1953: 208). But the precedents cited for this proposition

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40. Watrin, 1958: 29. From the standpoint of French administrative law, Pacteau makes subtle and interesting distinctions between "rejected *res judicata*," "granted *res judicata*" and "declared *res judicata*" (1985: 269). See also Delvolvé who analyses the literature on the subject by constantly stressing the fundamental distinction between "*res judicata*" and "binding force" (1983-84: 115). The latter is not inevitably linked to the former, specifically with respect to interlocutory judgments.

41. For a comparison of civil law and common law on this subject, see Wasserman, 1956; Nadeau, 1986.

42. However, it should be noted that in 1916 an English case allowed that the Crown could be bound by "estoppel in pais" (*Attorney-General to the Prince of Wales* v. *Collom*), thereby initiating a minority trend in the case-law in both Great Britain and Canada: *R.* v. *Gooderham and Worts Ltd.*; *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Co.*; *R.* v. *C.P.R.* These precedents were not long-lived, because in 1931 Mr. Justice Angus of the Exchequer Court reaffirmed forcefully that "the Crown is not estopped by any statement of facts or any opinions set out in any department report or letter by any of its officers or servants" (*R.* v. *Capital Brewing Co. Ltd.* 182).

are not unequivocal.[43] For example, the case of *R.* v. *Dominion Building Corp. Ltd.* is not explicit, although an Exchequer Court decision of 1897, *R.* v. *St-Louis*, states clearly that "the doctrine of *res judicata* may be invoked against the Crown" (p. 330). Moreover, since the beginning of this century, the Supreme Court has made no clear ruling on this point, except in criminal law where *res judicata*, in the form of the special pleas of *autrefois acquit* and *autrefois convict*, operates in favour of the accused to prevent successive prosecutions (*Kienapple* v. *The Queen*; Del Buono, 1983: 301). In civil proceedings, doubts linger.

Can *res judicata* effectively bind the Crown? Chitty implies that the Crown benefits from immunity in this area, so that an express legislative provision to the contrary must normally be invoked.[44] Besides these traditional arguments, the most serious obstacle remains the concept of *res judicata* itself. In civil law, for example, *res judicata* classically consists of three elements: the legal force of truth (*la force légale de vérité*), binding force (*la force obligatoire*) and executory force (*force exécutoire*) (Watrin, 1958: 39). English law has a comparable concept, the "conclusiveness of judgments" (*Halsbury*, 1983, Vol. 26: 273). The third of these three civil law requirements, executory force, is absent in Crown proceedings because of the latter's immunity from compulsory execution. At common law the right to execution is one of the normal attributes of *res judicata*, and where it is not present *res judicata* cannot be invoked: "the majority of judgments and orders require one or more parties to do or abstain from doing some act, and, if such a judgment is not obeyed, some further legal process is required to ensure compliance, [specifically] ... various modes of execution and analogous proceedings" (*id.*: 289). The constitutional status of the courts, the legal basis of their powers, and concepts of judgment and *res judicata* permit an appreciation of the scope of the Crown's special status. Because it is above the law, the Crown is also above *res judicata*. This quite surprising observation is consistent with the state of the law.

Given these requirements, *res judicata* only applies to judgments which do not imply recourse to some form of execution, but rather to judgments that are self-executing. This is particularly the case with the declaratory judgment, one of the few areas where *res judicata* may apply to the Crown. But if the declaration is being used to compel execution of a judgment, other difficulties arise.

2. Declaratory Judgment

Although Mullan considers that "[t]he *Federal Court Act* does not contain any specific authorization for the issue of a declaration ... against the Crown" (1975-76: 116), other authors feel that this remedy may lie under section 17 (Lemieux, 1983: 6-09) or even section 18 (Dussault, 1974: 1009). To date, the courts have not been concerned to clarify the point, but have allowed a rather broad use of the declaratory judgment against the Crown (see *Emms* v. *The Queen*; *Smith* v. *The Queen*; *General Bearing Service Ltd.* v. *The Queen*). In so doing, they have given this remedy a

43. In the previous century, Mr. Justice Gwynne, without referring explicitly to the Crown, effectively ruled that federal authorities were bound by *res judicata* (*Fonseca* v. *Attorney General of Canada* 619).

44. In *St-Louis*, this was the reasoning of the attorney for one of the parties, who claimed that because of article 6 of the *Civil Code* (Lower Canada) the Crown was bound by article 1241 of the same Code with respect to the definition of *res judicata* (p. 341).

meaning and scope traditional to common law countries (Zamir, 1962: 11). In England, the declaratory action has enjoyed a considerable extension in administrative law (Wainwright, 1981-82: *in fine*). May it now be used to subject the Crown to execution process?[45] To the extent that constraint and compulsion are hardly compatible with such a remedy, has its original purpose been debased?

Initially, the declaratory judgment was clearly preventative, and not curative, in nature.[46] In Québec, this distinction was emphasized by introduction of the declaratory judgment by motion in the new 1966 *Code of Civil Procedure* (ss. 453-456; Ferron, 1973; Sarna, 1973). But the importance of the distinction today has been diminished by the Supreme Court, which has allowed municipal by-laws to be annulled by declaratory judgment (*Duquet* v. *Town of Sainte-Agathe*; Grey, 1978). Already accepted in English administrative law (Wainwright, 1981-82: 26; *Congreve* v. *Home Office*), this broadening has made the declaratory action a more meaningful remedy. Quashing is a genuine sanction of administrative action, going well beyond the idea of a "latent right" that the court is asked to unveil.[47] Originally understood as a non-executory remedy that would clarify the plaintiff's rights and obligations,[48] the declaratory action has acquired a much more active role. To this effect, Lemieux (1983: 6-09) has recently affirmed that it may even [TRANSLATION] "be used to *prevent* an illegal act" and also to [TRANSLATION] "*require* respect of a duty." [Emphasis added]

As significant as its evolution may seem, strict limits still prevent the declaration from taking on the features of a direct action or a pre-emptive remedy such as mandamus. A provision such as section 456 of the *Code of Civil Procedure* may imply coercive purposes, by stating that "a declaratory judgment ... has the same effect and is subject to the same recourses as any other final judgment." But to be genuinely executory the declaration must also lead to effective compulsion. This raises the issue of the remedy's purpose.

Many authors deny that the declaratory judgment may have a coercive purpose. In examining its scope in administrative law, Warren concludes that its principal advantage is precisely "the absence of coercive force behind the judgment .... The absence of sanctions against public authorities decreases the chance of hostility in the proceedings, and recognizes that public officials in a democratic society act more often as a result of a perceived public duty than private gain" (1966: 642). This view of the declaration puts it in a different category of remedies from coercive measures such as compulsory execution. But because the declaratory judgment may result in the vacating of an administrative act, it is less benign than usually thought, and may even leave open the possibility of genuine sanctions. No doubt the Administration considers the quashing of its acts as a sanction, but here sanction no longer means only an executory measure. For example, the Federal Court has already declared that taxes "improperly exacted" were to be reimbursed (*General Bearing Service Ltd.* v. *The Queen*).

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45. Specifically, this is the position of Garant, 1985: 387.

46. "It will be seen that the essence of the declaratory judgment is the determination of rights. It is an adjudication, in the full sense of the word, which does not create new rights or duties, but confirms the existence of a jural relation. The effect of a declaratory judgment is then only 'to declare what was the pursuer's rights before'" (Martin, 1931: 547).

47. On this idea of latent rights, see Ferron, 1973: 382.

48. To learn more about the English approach in the nineteenth century, see Sarna, 1978: 4.

But even if it has a broader scope, the declaratory judgment remains a remedy that cannot result in sanctions. It does not give rise to execution process to compel compliance. Wainwright considers that the declaratory judgment [TRANSLATION] "declares the state of the law that is applicable at a given time without stating any sanction for the defendant" (1981-82: 23). Rejection of the possibility of sanctions amounts to excluding measures of compulsory execution. However, there is nothing to prevent the emergence of other sanctions. Indeed, [TRANSLATION] "even though failure to conform with a declaratory decision does not result in direct legal sanctions, acts that are not consistent with the provisions of declaratory judgments may be considered to be without legal effect in a situation where their validity is tested in a subsequent proceeding" (*ibid.*). But this is of little interest if the declaration is sought to obtain compulsory execution of a judgment. The problem is really administrative inertia, as no positive measure has been taken to ensure that the judgment is respected. Measures may only be quashed for illegality where there is active and direct violation of a judicial decision, although such a remedy seems hardly appropriate to sanction normal public administration. Basically, compulsory execution is not compatible with the declaratory judgment. Pépin and Ouellette summarize the situation as follows: a declaratory judgment [TRANSLATION] "is without executory or coercive force" (1982: 364).

Even if it were ultimately possible to obtain a declaration of the right to execution in the case of violation of a previous judicial decision, such a judgment would get the creditor no further ahead precisely because public authorities are still immune from execution. The absurdity of this possibility is patent: How could a judicial remedy not liable to compulsory execution serve as a palliative for a refusal to execute? To counter the bad will of public authorities, the individual must be able to get a real result, and the declaratory judgment cannot provide this. Taken alone, the declaratory judgment is an illusory remedy; ideally it should be supplemented with a mandatory procedure such as injunction (*Pyx Granite* v. *Minister of Housing*; *Minister of Finance of Canada* v. *Finlay*; Pépin and Ouellette, 1982: 377). But once again, the injunction against the Crown is not without its own problems, as will be seen in the next section.

B. Active or Executory Remedies

Even if the cases give some direct effects to the declaratory judgment, the remedy still cannot be deployed to force recalcitrant authorities to act in a specific way. Such a result normally can be obtained only through mandatory remedies, such as the injunction and mandamus. These involve direct coercion aimed at the performance or non-performance of a specific act. Depending on the plaintiff's objectives, a punitive remedy, where an element of moral or material compensation prevails, may also be of use. These consist of contempt proceedings and the traditional action in damages.

1. Mandatory Remedies

Even if the injunction and mandamus have the same general purpose, they are not available under identical conditions. Their different origins explain this result. The injunction is a private law remedy whose extension into public law is a relatively recent

phenomenon. In Crown proceedings, however, distinctions between the two lose much of their significance. In 1976, the Federal Court considered it to be "obvious" that "no court may grant a mandamus or an injunction against the Crown" (*Laurent* v. *The Queen* 49). Immunity from prerogative writs and injunction is also clearly spelled out in all provincial statutes.[49] Despite these obstacles, given their recent evolution, it is worth considering whether they can be used to coerce public authorities. Because these developments have differed for each of the two remedies, they will be discussed separately.

(a) *Problems with the Injunction*

Despite hopes generated by the availability of injunction against some public authorities, major obstacles still restrict its scope and effectiveness. Injunction may be sought only in a small number of situations; in addition, there are strict conditions limiting its availability. These limits take on a special importance if the injunction is to be used to compel public authorities to execute a judgment.

(i) *Parties Defendant*

The main factors conditioning the issuance of an injunction against a public authority are the status of the authority and the legality of its action. Although there is little doubt that injunction may be granted against "the Administration which is not the Crown," it is not available against those who are associated with the Crown (Strayer, 1964: 2; Lemieux, 1983: 7-14). This immunity is based on the fact [TRANSLATION] "that judges do not issue orders that they cannot have executed" (Pépin and Ouellette, 1979: 275), sending us back to the overall problem of the relationship between Crown and courts (see *supra*, p. 10). Indeed, "the injunction is a specific order from the court to a member of the executive branch demanding specific compliance" (Strayer, 1964: 1). Pursuant to general principles of public law and common law, direct constraint of the Crown is not allowed. Despite the suggestions of some authors[50] as well as a formal recommendation of the Commission (Canada, LRCC, 1977: 47), the general principle governing the availability of injunctive relief against the Crown remains immunity.

Analysis of the cases only confirms the continued applicability of this general principle. The Federal Court has been the most unequivocal. On several occasions it has reaffirmed the immunity rule. In 1982 in *Grand Council of the Crees (Quebec)* v. *The Queen*, Mr. Justice Pratte of the Appeal Division noted that

> ... various provisions of the *Federal Court Act* ... do not, in my view, have the effect of abridging the traditional immunity of the Crown from injunctive relief. If Parliament had wanted to modify or repeal such a well-established principle, much clearer language would have been used. (p. 600)

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49. For Québec, *Code of Civil Procedure*, s. 94.2; for Ontario, *Proceedings Against the Crown Act*, s. 18(1).

50. [TRANSLATION] "It becomes a question of protocol to deny an injunction only because it is directed against the Government or the Crown" (Pépin and Ouellette, 1982: 362).

In a recent case, the same judge adopted an identical position.[51]

Despite this line of authority, which is hardly favourable to claims by individuals, other judges have allowed injunctive relief when public authorities commit an illegal act or exceed their jurisdiction. The immunity they enjoy has therefore become relative, if they exceed the limits of their jurisdiction.[52] In the *Société Asbestos Ltée* case, the court went even further in granting an injunction against the Crown on the simple threat of illegality, more specifically the unconstitutionality of a statute.

This latter approach may be reconciled with the views expressed by the Federal Court, if the nature of administrative action in question is distinguished. Where this is truly administrative and does not result from a legislative mandate, immunity remains the rule. In *Grand Council of the Crees (Quebec)*, Mr Justice Marceau referred to "duties of a general administrative nature" for which the Minister was only responsible to the Crown (p. 600). On the other hand, if administrative action flows from objectives set out expressly by statute, it is sufficient to allege any ground of illegality to overcome the immunity. While the distinction is clear, one might still question its relevance, since all administrative action at some point is directed to the pursuit of legislative objectives. Administration is not an end in itself.

This breach in the scheme of Crown immunity opens up an interesting alternative if it is possible to characterize the failure to respect a judgment as an illegal act. The argument would be that a judicial decision, viewed as a precedent, is law, so that its violation amounts to an abuse of authority amenable to injunctive relief. But the hypothesis is still highly speculative, since heretofore injunctions have only been granted to restrain legislative and constitutional illegality. Moreover, Crown immunity from execution has a legislative foundation, and statutes are hierarchically superior to judicial decisions. Finally, it might even be that the Crown's failure to comply with a judgment does not amount to an illegal act. Not only is the Crown immune to any form of judicial constraint, but it may also consider that it is not really subject to the principle of *res judicata* for the reasons mentioned above (see *supra*, p. 30). Given these doubts about the very concept of an illegal act,[53] injunctive relief in this area remains extremely uncertain.

In order to circumvent this problem, it is always possible to attack directly an individual public servant or agency head. Injunctive proceedings are then directed against the individual and not against the Crown. Such a distinction has been favourably received in Québec, where courts have rejected a Crown agent defence raised by

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51. "There is a rule of long standing that the courts cannot issue an injunction against the Crown. This rule may seem archaic, but this Court has recently held that it still applies and that it was not abolished by the *Federal Court Act*. In these circumstances, I consider that this recent decision must be followed until the legislator or the Supreme Court of Canada decides otherwise" (*C.I.A.C.* v. *The Queen* 869-70).

52. "[A] person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the Court to prevent the corporation from doing that which it is not authorized to do as a Crown agent" (Mr. Justice Martland in *Conseil des Ports Nationaux* v. *Langelier* 74). See also: *Amax Potash Ltd.* v. *Government of Saskatchewan*; *Procureur général du Québec* c. *Société du parc industriel du centre du Québec*; *Lepage* v. *Association québécoise des pharmaciens propriétaires*.

53. For example, Garant questions whether violation of a contract by the Administration amounts to illegality: [TRANSLATION] "Cannot breaking a contract be considered as an act that is *ultra vires*?" (1985: 387).

Ministers against whom an injunction was brought on their personal capacity.[54] In federal law, this manœuvre has only had limited success. Citing an earlier Supreme Court decision (*The Minister of Finance of British Columbia* v. *The King*), the Federal Court refused to issue an interlocutory injunction against two federal ministers on the grounds

> ... that a mandatory order cannot be issued against a Minister of the Crown when he is simply acting as a servant of the Crown rather than as an agent of the legislature for the performance of a specific duty imposed on him by a statute for the benefit of some designated third person. (*Grand Council of the Crees (Quebec)* v. *The Queen* 601)

From this angle, injunction probably only exists for a limited range of situations. The Minister must refuse to accomplish an express statutory obligation that benefits the interests of some designated third person. Therefore, the concept of an illegal act has a very specific meaning, which Québec courts have done little to articulate, being either too general — allusion to "want of jurisdiction" (*Ascenseurs Alpin-Otis Cie Ltée*; *Association espaces verts du Mont-Rigaud*) — or too confused (*M.D.J. Ltée*).

Whether it receives a large or narrow construction, the notion of an illegal act being considered here must result from legislation rather than precedent, and consequently we are thrown back to the general obstacles mentioned earlier in connection with the specific case of execution of judgments.

(ii) *Criteria of Availability*

From a review of the criteria governing the availability of injunctions (colour of right, gravity of harm, balance of inconvenience), it is apparent that the remedy is completely discretionary. As commentators note, issue of this remedy [TRANSLATION] "is largely discretionary" (Pépin and Ouellette, 1982: 359) because it implies a subjective evaluation of the position of each of the parties with respect to the other and of their respective interests. Here it seems reasonable that a comparison between the public interest and a purely private interest will hardly favour the latter. The famous case of *Société de développement de la Baie James* is an excellent illustration. Although the trial judge admitted that the balance of convenience favoured the aboriginal peoples, the five Québec Court of Appeal judges ruled firmly in favour of the Government. In their analysis of the balance of convenience, it is striking to see how easily the judges associated the general interest with the ends pursued by the Government, the two appearing to coincide. As Mr. Justice Turgeon noted, [TRANSLATION] "the interests of the Québec public are represented in this case by the principal appellant companies" and "the evidence shows that it is imperative for Hydro-Québec to carry out its project ..." (p. 177). Thus courts may well show great sensitivity to this mystical general interest so as not to disrupt the smooth operation of public services. Of course, as the *Société Asbestos Ltée* case seems to suggest, in order to prevail the Administration must actually prove that there is a conflict between public and private interests. But since the public is often dependent on the undisrupted operation of

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54. See *Ascenseurs Alpin-Otis Cie Ltée* c. *Le procureur général du Québec*; *Lepage* v. *Association québécoise des pharmaciens propriétaires*; *Peetroons* c. *Ministre de l'Agriculture du Québec*; *Morin* v. *Driscoll College Inc.*

administrative services, courts are understandably hesitant to issue orders enjoining the Administration. *Vis-à-vis* the State, private interests can easily be seen as subordinate and contingent. For all these reasons, the use of injunctive relief to compel public authorities to execute a judgment remains doubtful.

(b) *The Limits of Mandamus*

Compared with injunctive relief, mandamus seems a more plausible recourse because it was actually created to force a public authority to carry out a legal duty or obligation. To counter non-compliance, Harlow proposes use of mandamus (1976: 123), since its very purpose is to respond to the Administration's inertia. As Dussault points out, it contemplates [TRANSLATION] "ensuring the execution of a public duty" (1974: 1044), something which seems to suggest that it may be used against an authority which fails to comply with a judgment.

The use of mandamus is not, however, totally free of problems. In principle, the Crown is still immune from this remedy. This rule was strongly affirmed by Mr. Justice Walsh in *Rossi*, who concluded peremptorily that mandamus does not lie against the Crown. Yet it may be, subject to what has already been said about the injunction, that this problem may eventually be side-stepped by the direction of proceedings specifically at the public servant or agent who has refused to respect a statutory obligation. As a direct recourse against the Crown, mandamus is all the more uncertain because compulsory execution of the order is not possible. Some commentators do suggest that defiance of mandamus can give rise to contempt of court proceedings (Pépin and Ouellette, 1982: 314; Reid and David, 1978: 417) — in Québec, this is provided for by section 836 of the *Code of Civil Procedure*. But there is no little absurdity in a situation where a private individual must resort to contempt proceedings upon a mandamus to execute an earlier judgment and still not be certain that that initial judgment will be complied with.

Another more serious problem flows from limits on duties which may be compelled by mandamus. All commentators have noted that [TRANSLATION] "for the writ to be admissible, the defendant must be forced according to the terms of the enactment to act in a given way."[55] The obligation must be directly prescribed by statute[56] or regulation, as was the case in *Vic Restaurant Inc.* v. *City of Montreal*. Thus, mandamus would only be available if by ignoring a judgment, the Administration violates a duty imposed by statute or regulation. Besides statutory duties of form and procedure (inquiry, consultation, and so forth), such cases might include those where the authority refuses to act in a manner logically implied from the quashing of a prior act, or to perform a purely ministerial function. However, there are many examples of enactments that impose no specific duties on the Administration. Mandamus would not lie to compel compliance where the Administration enjoys a subjective discretion, notably disputes relating to the exercise of discretionary power, cessation of a nuisance, repair of harm, execution of a contract, exercise of police administrative powers, to

55. Lemieux, 1983: 5-02; de Smith, 1980: 54. This author is careful, however, to recognize a larger basis for the admissibility of mandamus ("charter, common law, custom or even contract"), but without being very convincing on this issue. To the same effect, see also Whitmore and Aronson, 1978: 376.

56. See in this sense: *Weatherby* v. *Minister of Public Works*; *Harcourt* v. *Minister of Transport*; *Bay* v. *The Queen*.

name only a few. In *National Indian Brotherhood* v. *Juneau*, the Federal Court has already refused to issue mandamus to compel the C.R.T.C. to hold a public hearing since the decision whether or not to do so was purely discretionary (see also *Moreau* c. *Cité de Sherbrooke*). But, while an administrative authority cannot be compelled to exercise a discretionary power in a given way, it is still susceptible to mandamus if it exercises those powers in a way which is arbitrary or contrary to statute (*Padfield* v. *Minister of Agriculture, Fisheries and Food*; *Air Canada* v. *Attorney General of British Columbia*).

It is possible, however, to construe the "legal duty" requirement broadly. Does not a judgment in favour of a private individual also create a legal duty for the Administration, a duty imposed by judicial decision? That is, in recognizing pre-existing legal imperatives, the judgment confirms a vested right to which the Administration is obliged to conform.[57] The concept of vested rights nevertheless has its limits, and the courts have always required that the rights in question be given expressly by statute.[58] They cannot arise from liberal judicial interpretations of statutory language. Mandamus would appear, therefore, to be a remedy for compelling public authorities to respect the legality of a statute, but not a judgment (*Rossi* v. *The Queen*).

Clearly then, mandamus is no panacea for non-compliance with a judgment. Although it has greater possibilities than either the declaratory judgment or the injunction, it is not without its own external and internal drawbacks.

2. Punitive Remedies

Besides direct coercive remedies, there are others which are punitive in nature. The possibility of a contempt of court citation or of a damages award raises the spectre of genuine punishment for whoever defies a judgment. A plaintiff who has little interest in full compliance may instead resort to these forms of moral (contempt of court) and monetary (damages) punishment.

(a) *Contempt of Court*

To sanction acts or omissions which impugn the authority of a court, the common law allows the judge to cite for contempt of court. Such a sanction is deemed inherent in the powers of the court (Jacob, 1970: 26), and has very different implications depending on whether the contempt is civil or criminal.[59] Non-compliance with a judgment belongs to the first category, because the purpose of civil contempt is "the enforcement of judgment or orders of the court" (Borrie and Lowe, 1973: 314). In

57. In Québec, some judges consider mandamus to be admissible to protect vested rights. This is especially the case in municipal affairs, under the pretext of a "flagrant injustice" which would result from non-respect of vested rights prior to enactment of a zoning by-law: *Hanschild* c. *Corporation de la ville de Delson*.

58. See *Blais* c. *L'Association des architectes de la province de Québec*; *Tsiafakis* v. *Minister of Manpower and Immigration*; *Bouchard* v. *Les commissaires d'écoles pour la municipalité de Saint-Mathieu-de-Dixville*.

59. On this distinction, see: Harnon, 1962; Ziegel, 1959: 262; "Contempt of Court" in *Halsbury*, 1983, Vol. 9.

principle, ''it is a contempt to disobey a judgment or order either to do a specified act within a specified time or to abstain from doing a specified act'' (*ibid.*). In other words, contempt may be deployed to repress certain types of disobedience committed *ex facie* (outside the courtroom) (Canada, LRCC, 1977a). For all practical purposes, civil contempt is only aimed at defiance of mandatory orders such as injunctions and a mandamus, and its use where an ordinary judgment has not been complied with is considered merely hypothetical.[60]

When a public authority ignores a judgment, is it possible to bring contempt of court proceedings? This is a complicated question, and there is much to suggest that it is utterly ludicrous for the Crown to be cited for contempt. For reasons related to the scope of the powers of the courts, to the nature of the immunity enjoyed by the Crown, and to the nature itself of the sanction for contempt of court, a conviction of the Crown for contempt of court is unlikely under existing law.

In an historical context, it should be noted initially that the contempt power is inseparable from the prerogatives of the Crown. As Watkins observes, ''the courts, as agents of the King, derived their use of the contempt power in such cases from the presumed contempt of the King's authority'' (1967: 126; Beale, 1908: 164). In other words, disobeying the courts amounts to disobeying the Sovereign, and this means that contempt is directed towards Her Majesty. By the mechanism of delegation of royal justice, the courts have thus found themselves with the ''right to punish disobedience, obstruction or disrespect'' (Watkins, 1967: 126). With the Acts of Settlement in the eighteenth century, the role of contempt changed, and the courts henceforth used it to protect their own authority. Yet the courts are still ''the King's Courts'' and Her Majesty is still the fountain of justice. To find the Crown in contempt, therefore, would seem to be at odds with the very spirit of English public law.

The second problem with contempt for disobedience to an injunction or mandamus flows from the nature of Crown immunity. Because the Crown is protected from these mandatory recourses, it cannot be held in contempt as a sanction for disobeying them.[61] But to the extent that injunctive relief may now lie against the Crown under certain conditions, it is not inconceivable that the Crown be held in contempt of court. A charge of contempt against a Crown agent has already been brought before the Supreme Court.[62] But, in the *Société Asbestos Ltée* case, the Québec Court of Appeal implied that a contempt citation would not lie. Mr. Justice Lajoie observed that [TRANSLATION] ''the impossibility of holding the Solicitor General in contempt of court for violation of an injunction does not convince me that this injunction cannot be granted'' (p. 350).

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60. ''In general, no one is liable to contempt proceedings and committal for the non-payment of a sum of money'' (Watkins, 1967: 136).

61. In Québec, for example, because of section 94.2 of the *Code of Civil Procedure* the Crown is exempt from the application of section 836 of the same Code, which provides for contempt of court in the case of violation of a judgment favourable to an extraordinary remedy. Similarly, it escapes section 761 making any person who violates an injunction guilty of contempt of court.

62. *C.B.C.* v. *Quebec Police Commission*. The dispute had left the impression that the Supreme Court would pronounce itself on the powers of the Québec Police Commission to convict a Crown agent for contempt of court, in this case the C.B.C. It was a classic case of contempt, the corporation having published a photograph of a witness despite the Commission's formal prohibition. In its petition for evocation, the C.B.C. invoked its immunity from charges of contempt of court. Relying on *Conseil des Ports Nationaux* v. *Langelier*, the Québec Court of Appeal rejected this argument. The Supreme Court did not rule on the question, reversing the Court of Appeal decision on the pretext that the Commission was not invested with the power to convict for contempt of court.

To the extent that contempt of court is a means of pressure aimed at extracting the recalcitrant party's compliance with a mandatory judgment, it is thus, if not a direct, at least an indirect means of compulsory execution. Here there is no breach in Crown immunity. It follows that the Crown is not only "immune from all ordinary modes of enforcing a judgment" (*Halsbury*, 1983, Vol. 11: 765), it is also protected from any proceedings serving to compel the exercise of its will in a particular way.

This last point suggests a third and decisive objection. Obviously the very nature of the sanction for contempt of court cannot apply to the Crown. Crown property cannot be sequestrated, nor may the Crown be imprisoned.[63] As for imprisonment, Her Majesty cannot be subjected to any form of criminal charge leading to arrest and imprisonment. Arguably even charging the Crown with contempt should be ruled out. The argument is as follows. The distinction between criminal and civil contempt is artificial (Watkins, 1967: 138; Canada, LRCC, 1977a: 25; Barrie and Lowe, 1973: 370) because the nature of contempt proceedings rapidly transforms them from the civil into the criminal (Berger and Brown, 1965-66). And in principle, the Crown cannot be charged with any criminal offence.[64]

But the Crown's immunity from criminal proceedings is no longer absolute. The Supreme Court recently dismissed the C.B.C.'s argument that as a Crown agent it could not be charged under the *Criminal Code* (*C.B.C.* v. *The Queen*). Applying the principles set out in *Conseil des Ports Nationaux* v. *Langelier*, the court ruled that to benefit from its traditional immunity, the C.B.C. had to use its powers in a way that was compatible with the purposes of its governing statute, something it did not do in broadcasting a film contrary to the requirements of the *Broadcasting Act* and regulations. On the other hand, as the case of *R.* v. *Eldorado Nuclear Ltd. and Uranium Canada Ltd.* demonstrates, observance of statutory purposes has enabled other Crown agents to avoid criminal charges. If the purposes of the statute are drafted in general terms, it becomes even more difficult to claim that these have not been respected. The *C.B.C.* case shows that susceptibility to criminal proceedings exists only in cases of obvious and gross violation.

Although it is now clear that the Crown and its agents may be liable to criminal charges under certain limited conditions, this still does not mean it can be held in contempt of court. Contempt proceedings are unique, in that they confer extraordinary power upon a judge, a power derived from Her Majesty herself. With contempt of court, we are directly confronted with the very basis of the courts' "jurisdiction."

Under existing law, it is highly improbable that contempt of court charges could lie against an administrative service or entity that accedes to the special status of the Crown. While this rule could be changed by the introduction of some distinctions within the concept of the Crown, to do so would raise new problems and curious paradoxes, as the *Eldorado* case clearly shows.[65]

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63. See particularly: (Québec) *Code of Civil Procedure*, s. 94.2; (Saskatchewan) *The Proceedings Against the Crown Act*, s. 17(2); (Ontario) *Proceedings Against the Crown Act*, s. 18.

64. "The weight of authority suggests that the presumption that the Crown is not bound by legislation is exceedingly difficult to dislodge in the case of a criminal statute" (Canada, LRCC, 1984: 15). See also McNairn, 1977: 87.

65. On these problems, see Canada, LRCC, 1985: 14-5.

On the other hand, it would seem that "the Administration which is not the Crown" could be charged with contempt of court. The conviction of agents and public servants, when they are charged personally, may also be envisaged. However, when these agents are acting in the exercise of their functions, they are often able to invoke either Crown immunity or some special statutory immunity.

(b) *Damages*

Rather than bring contempt proceedings against the Administration, a judgment creditor may opt for an action in damages, a more material form of revenge. Failure to execute a judgment may cause harm. It is not inconceivable that the Administration's bad will or negligence in failing to comply with a judgment constitutes a civil wrong for which there should be compensation. An example might be proceeding with construction work that has been declared illegal. On the other hand, where non-compliance merely results from an omission — and this is more frequent — there is more doubt about the Administration's liability. In the area of execution this phenomenon of omission takes the form of lateness, incomplete performance or pure and simple inertia.[66] Administrative inaction is a complex phenomenon going far beyond the area of execution of judgments.[67] The important point is that there is no clear recognition of the individual's right to force the authorities to act, as the case-law on this subject is still in an embryonic stage (Brown and Lemieux, 1979). The problems are most common with respect to claims for damages, both in common law and civil law.

The common law of "torts" does not easily recognize non-feasance as a tort. Street observes that "[the] English Law is reluctant to hold a person liable for omissions" (1968: 108). Where there is no "duty to act," inaction does not constitute liability in tort.[68] In administrative law, such a duty to act could only arise by statute (Wade, 1982: 665; Hogg, 1971: 99). Absent a statutory duty, an administrative authority remains free to act as it wishes. Here the authors distinguish between "duty" and "power"; failure to exercise jurisdiction or power does not incur liability, at least in principle (Wade, 1982: 662; *contra, City of Kamloops* v. *Nielsen*). The only way to reverse this presumption against liability is to plead a negligent exercise of a power, for example because of excessive delay. Nevertheless, it is hard to make out a case for delay as negligence. In the *East Suffolk Rivers Catchment Board* case, the Administration ("the Board") took 178 days to repair a sea-wall when fourteen would have been reasonable; the effects of a flood which took place in the interim were devastating, but the House of Lords did not consider this administrative slowness to be actionable.

A new and broader theory of public authority negligence does, however, seem to be emerging. In *Dutton*, Lord Denning challenged the traditional power or duty dichotomy by suggesting that an intermediate term, control, could give rise to liability

66. On passive resistance, see *supra*, p. 22.

67. Suffice it to mention non-ratification of a contract, non-application of official regulations, non-operation of a service, non-payment of a benefit, non-payment of a debt (Montané de la Roque, 1950).

68. "In the absence of some existing duty the general principle is that there is no liability for a mere omission to act" (Salmond, 1965: 291).

where there was negligence (p. 391). This important decision was approved by the House of Lords in a similar case (*Anns* v. *Merton London Borough Council*). The negligence in these cases resulted from a positive act, namely an inspection, and not from an omission. Inaction is more easily tied to negligence in the area of discretionary power. For example, in the *Dorset Yacht* case, the Home Office (the Crown) was held liable because it exercised insufficient care with respect to detention measures for young offenders.[69]

Yet one ought not to lose sight of the limited scope of these developments when assessing their relevance to problems of non-compliance. In trying to find remedies for special situations, the courts have remained wedded to the concept of duty, whether express or simply implicit in the statute. It is no help where mere shortcomings of the administrative authority are alleged. Often, the Administration has no precise and imperative duty to act, but merely the possibility of acting. A judgment may well impose a moral obligation on the Administration; but its inaction cannot be likened to the breach of legal duty such as that found in *Dorset Yacht*.

Inspired by common law, English administrative law considers liability resulting from inaction very narrowly. Any change in this situation would require a redefinition of the basis of liability in tort. In the civil law, however, fault may result from a simple omission or from abstention (Baudouin, 1973: 49). While in the past, commentators such as Mignault, who were probably influenced by the common law, argued that omission is only a fault when there is a legal duty to act (1901: 333), contemporary authors prefer to view everything as a question of the circumstances of the case (Baudouin, 1973: 50; Mazeaud and Tunc, 1965: 633; Le Tourneau, 1982: 658). All depends on the situation of the individual at the time of the alleged fault. His conduct is assessed according to the traditional criterion of the careful and diligent person, the prudent administrator, the "ordinary person" (Mazeaud and Tunc, 1965: 634). If harm results because a judgment has not been executed, the courts are free to decide whether the Administration has been diligent in adopting the measures that circumstances dictate. The Administration's duty to act is therefore conditioned by objective elements of fact and law, as well as by more subjective criteria related to its ability to anticipate, its attentiveness, in other words, good administration. In civil law the *bon père de famille* is replaced by the good public administrator, who prudently takes appropriate measures so as to avoid unnecessary harm.

Theoretically, civil law allows financial compensation for all types of damage. Its application to the Crown has certain advantages because, in Québec civil law, the Crown enjoys in principle no special status in the field of liability (subject to special statutory immunities and privileges). The Crown is subject to the *Civil Code* like any individual (see *Code of Civil Procedure*, s. 94). Under English-Canadian law, the individual can hardly hope for other forms of compensation than those provided by

69. While escaping, the convicts took over the plaintiff's boat and damaged it. Even if the organization of prisons was subject to discretionary appreciation, the judges still considered that the latter had been exercised "so carelessly or unreasonably" (p. 1031) that the clear result was an excess of power. By unreasonable negligence in the exercise of their discretionary power, the authorities had done nothing less than violate the intentions of the legislator, by creating a situation similar to the one which would result from the total non-exercise of their discretion. Considering the potential dangers arising from custody of these "dangerous boys," in reality there existed "a duty to take reasonable care that they could not injure the public" (Wade, 1982: 657). The *Dorset Yacht* case remains true to this requirement of a duty, the "duty to care" thus replacing the "statutory duty." This progression is nothing more than the extension of "duty to care" to the public authorities.

common law or the *Crown Liability Act* (which is mainly based on the common law system). It is difficult to invoke equity, because "equitable relief" always involves specific performance where financial compensation is not deemed appropriate.[70] Even if equity may be invoked in defence against the Crown,[71] it is unavailable to a plaintiff in a damage suit and above all, in the case of the Crown, to obtain execution. It is further limited because it does not exist as a parallel remedy where specific rules already exist: "Equity follows the law."[72]

Conclusion to Chapter One

This initial review of real or potential problems in the execution of judgments against the State has focussed on a number of issues. A large part of the federal Administration may claim a special status with respect to judicial control because it accedes to the immunities of the Crown. Not only do these entitle it to special treatment during litigation, but even after judgment it enjoys privileges which shield it from compulsory execution. In a system where judicial review is being so readily lauded, it is striking that administrative law leaves the execution of judgments to the discretion and good will of the Administration. Although Government and administrative bodies are showing more deference to the courts, existing law is nonetheless marked by the absence of any real safeguards for the execution creditor. To summarize, he confronts two major problems:

— There is no clear and specific obligation on the Crown to execute fully judicial decisions.

— Where there is inertia or bad will on the part of public authorities, the execution creditor has only feeble techniques to obtain execution of a judgment in his favour.

In practice these shortcomings draw the execution creditor into a second round of legal proceedings — out-of-court negotiations following judgment. As he has no concrete way of insisting on full execution of his judgment, the Administration may well procrastinate to force him to come to terms. Indeed the greatest danger is incomplete or insufficient execution, resulting from the concessions the execution creditor must make to avoid additional litigation or further delays.

Relations between the State and the citizen should be subject to rules based on law, and not good will and propriety. As part of the clarification and modernization of the legal status of the federal Administration, immunity from execution must be fundamentally reappraised. It must be eliminated where it is not relevant, and subjected to safeguards in favour of the execution creditor in those cases where immunity continues to be warranted.

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70. "Equity" in *Halsbury*, Vol. 16: 869.

71. In contract law, see *Attorney-General for Trinidad and Tobago* v. *Bourne*. In real estate law, see *Attorney-General to the Prince of Wales* v. *Collom*.

72. "It comes into operation only where the parties are involved in some relation which will give equitable doctrines room and scope." See *Maine and N.B. Elec. Power Co.* v. *Hart*.

CHAPTER TWO
Reappraising Immunity from Execution

To recognize shortcomings in existing law is only a first step. The second is to reappraise immunity from execution in light of other transformations in contemporary law. Even if the need for change is evident, still there is nothing to suggest how this should occur. The principal problems flow from the specific character of public law and the unique nature of the State. Until now, these particularities have been implicitly accepted by the vast majority of jurists, who, moreover, have been reluctant to accept the principle of compulsory execution against the Crown and its agents. For them, accepting compulsory execution amounts to ignoring the special nature of the State, and resurrecting the same set of problems discussed in Working Paper 40 (Canada, LRCC, 1985).

To bolster the case for reform, it is useful both to review proposals by academics, and to examine the experience of other countries. Although somewhat diffuse, there is a current of opinion in favour of modifying the privileged position of the Administration in the area of execution (Section I: *Existence of a Reform Movement*). The existence of this current suggests that theoretical and conceptual problems with compulsory execution against public authorities are often the same in various Western countries. This school of thought also favours a relativistic approach which respects the balance between the execution creditor's legitimate rights and the imperatives of sound administration (Section II: *The Reality of Modern Administration*).

Section I: Existence of a Reform Movement

In several Western countries, renewed interest in the rights and freedoms of the individual has stimulated a far more critical approach to State privileges than in Canada. This interest has generated broad reform movements which in many cases have led to specific changes. Adherents to these movements have clearly gone beyond the issue of relations between the State and the execution creditor, to a general concern for the position of citizens before the courts (small claims, class action, legal aid). But in Canada, as in other common law countries, this trend has not yet brought about a change in Crown privileges and immunities. The experiences of other countries are considered therefore as precedents in any discussion of possible reforms.

I. *Developments in Other Countries*

Reforms dealing with disclosure of administrative documents, protection of confidentiality and giving of reasons for administrative decisions have been widespread throughout the Western world. Yet, according to information at present available, only California and France have reformed rules relating to immunity from execution.[73] In countries sharing the English constitutional tradition, it would be surprising for this problem to be treated in isolation, because it is bound up with the more general issue of Crown privileges and immunities. However, neither California nor France waited for an overall reassessment of sovereign immunity or the theory of *puissance publique* before undertaking or even contemplating changes.

A. The Situation in the United States

Sovereign immunity is a basic tenet of American public law. Recognized during the post-independence years, this principle has been liberally interpreted and broadly defined by the courts and the Congress. Despite legislative reforms that have tempered its rigour, to this day it has remained more or less absolute in scope. Some writers criticize the anachronistic nature of this privilege, given the State's growing commercial activity. Naturally, such criticism is inevitable where liberal economic values run up against an absolutist conception of the State.

1. Survival of Sovereign Immunity

The desire of the American revolutionaries to break with the British constitutional system was not as radical as is often thought. In America, the somewhat nebulous principle of royal sovereignty was simply transposed to the State, with the same consequences as in the motherland. This transfer materialized in "the doctrine of non-suability of the State." American law adopted the premises of common law ("the King cannot be sued without his consent") and made them absolute, all lawsuits being automatically excluded (Carrow, 1960; Street, 1953; Schwartz, 1976: 563).

This somewhat surprising development may be explained by two factors,[74] of which only the first is truly legal. Although the Monarchy had been suppressed, United States courts still concluded that the petition of right, which was the traditional way to claim damages from His Majesty, implied the idea of consent or permission from public authorities.[75] As His Britannic Majesty's successor was none other than the

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73. Two Australian states, Queensland and New South Wales, should however be given credit for allowing, in 1866 and 1912 respectively, means of compulsory execution against property of the Crown in order to satisfy a judgment, either when the coffers of the Treasurer-Paymaster General were empty, or when no moneys had been allocated by Parliament for that purpose. For other state and federal authorities, immunity remains the rule. See Campbell, 1969: 144; Renfree, 1984: 570.

74. "Why the English theory of sovereign immunity, in origin personal to the King, came to be applied in the United States is one of the mysteries of legal evolution" (Street, 1949a: 342).

75. This is the *concept of consent*; see Borchard, 1924: 4.

legislature (the various elected assemblies on both the local and federal level), the latter's silence could only be construed as a lack of recognition of the State's liability in tort (Jaffe, 1963: 2). For purely pragmatic reasons, politicians at the time were wary of according such consent. This leads to the second factor, which is purely political, for the perpetuation of this ancient immunity, now expressed as: "The State can do no wrong."[76] To protect national sovereignty, private interests could not be permitted to claim any form of pre-eminence over those of the State.[77]

To pre-empt a too liberal interpretation by the Supreme Court of individual legal rights *vis-à-vis* the State, in 1798 the eleventh amendment was enacted. This withdrew from the courts the power to allow lawsuits in common law or equity against any of the United States (Guthrie, 1908; Tribe, 1978: 129). In this way, sovereign immunity was crystallized and became "a natural principle" of public law.[78] Courts in the nineteenth century freely referred to necessity (see Mr. Justice Gray in *Briggs* v. *Life Boats*), wisdom, inconvenience (Pound, 1944) and general interest in support of the principle.[79] By the end of the century, the justification had evolved from necessity to a theory of legal positivism. In 1907, Mr. Justice Holmes declared the State to be sheltered from all lawsuits, not by virtue of some obsolete theory based on the Monarchy but for logical reasons, as no individual could have rights against the lawmaking authority (*Kawananakoa* v. *Polyblank*; *The Western Maid*). Other judges simply invoked the public interest, stating that they preferred to see isolated individuals suffer than to see hardship imposed on the public (Laferrière, 1963: 22)!

These arguments have helped to make sovereign immunity a watertight principle. American law does not even allow the petition of right.[80] In light of subsequent developments it is significant that immunity from execution has become intimately linked with immunity from any form of liability in tort. Indeed, the two immunities have the same origin, the former being merely the extension of the latter.

With no judicial remedy analogous to the petition of right, special legislation was the only way for an individual to obtain compensation. Harm could only be repaired by a private Bill of Congress, something which depended on a purely discretionary

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76. Hamilton affirmed that "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will" (1917: 126).

77. In reality, the decisive factor was far more prosaic. Heavily in debt because of the War of Independence, the States above all did not want their creditors to be able to compel repayment (Laferrière, 1963: 13).

78. Watkins, 1927: 194. This author notes that "the doctrine of immunity originated as a physical fact, [and] was accepted and applied without attempts at justification" (p. 197).

79. In an 1882 case, *U.S.* v. *Lee*, the Supreme Court declared:

> That maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defence and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light ships, established for the security of commerce with foreign nations and among the different parts of the country .... The principle is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created.

80. "Not only the petition of right but, I would suppose, some of the ground covered by *monstrans de droit*, traverse and bills in the Exchequer and Chancery become unavailable" (Jaffe, 1963: 19). Similarly, see Goodnow, 1905: 387.

assessment of the validity of the complaint and on solid political support from congressmen (Gellhorn and Lauer, 1955; Holtzoff, 1942; Shumate, 1942). In this way a very uncertain system of compensation developed, with the courts relying on "the good faith of the United States" (Stewart, 1979: 816) to ensure payment of legislated awards. The system had many practical defects, because the growing stream of applications for compensation led Congress to depend exclusively on specialized commissions too easily influenced by favouritism (Luce, 1932; Field, 1946). As early as 1855, measures were taken to correct this situation, notably through the creation of a specialized tribunal.[81]

In response to growing problems in the twentieth century, a major reform, the *Federal Tort Claims Act*,[82] was introduced in 1946. It made the "Federal District Courts" courts of first instance to hear tort claims against the Government, with an appeal to the "Court of Claims" and the Supreme Court (Klee, 1983: 7; James, 1955). Despite its significance, the statute still left intact the principle of immunity in tort. For claims falling outside the Act, Congress alone retains the authority to award compensation (Davis, 1970: 403; Gellhorn and Lauer, 1955: 4). "Purely out of concern for fairness," Congress continues to judge whether or not public funds should be used to satisfy private claims. Even if the *Federal Tort Claims Act* seemed to represent significant progress, the principle of immunity did survive in many areas of administrative action. This continues to be the case despite further amendments in 1966 and 1974 (Stoutamire, 1980; Scott, 1978). Today, for example, the statute contains no less than thirteen exceptions to its scheme of liability (Klee, 1983: 15).

The point to retain from this discussion is that American law has had considerable difficulty abandoning the theory of sovereign immunity. Although some State legislatures have enacted schemes of liability in tort roughly modelled on rules of private law,[83] numerous exceptions still help to ensure the survival of sovereign immunity. In fields other than tort, the rule of absolute immunity remains unscathed. Absent a statute explicitly authorizing compulsory execution against State, county or municipal property, immunity remains the rule.[84] In addition, courts have endorsed the

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81. In this way, the "Court of Claims," a federal institution, was created in 1855. Though not a full-fledged court, it still had the responsibility to study claims for compensation and to submit a report to Congress (Crane, 1920; Richardson, 1882). The commissions of Congress still retained the power to rule on the admissibility of claims. In 1863, the *Tucker Act* transformed the Court of Claims into a genuine tribunal, subject to the concurrent jurisdiction of the "Federal District Courts" and a right of appeal to the Supreme Court for sums greater than $3,000. However, this tribunal only had jurisdiction in disputes arising from contracts, with tort actions to be presented directly to Congress. Civil liability remained a congressional prerogative. Far from proceeding exclusively by private bill in order to settle disputes on an *ad hoc* basis, Congress introduced some partial exceptions to the general principle of non-liability of the State (Gellhorn and Schenck, 1947). For example, special schemes were enacted between 1900 and 1946 in the fields of patents, oyster farming and marine matters. However, these exceptions were shown to be plainly insufficient.

82. It is Title IV of the *Legislative Reorganization Act*. For more on this, see particularly Steadman *et al.*, 1983: 243.

83. In 1976, only twelve States had agreed to introduce a legislative reform in this area. It can safely be stated that immunity remains the rule and liability the exception. See Schwartz, 1976: 568.

84. Under American law, the State cannot be compelled to perform a specific act. "Suits for specific relief" are inadmissible under the *Federal Tort Claims Act* and the *Tucker Act*: "No specific relief in the absence of statute" (Steadman *et al.*, 1983: 137). This immunity is based on the rule that "the sovereign cannot be subject to any burden originating in the courts — the courts cannot direct the sovereign" (*id.*: 250). In the case of inaction by the authorities, quite often the only alternative for the individual is a suit in damages. See Warner, 1967: 818.

view that "a statute authorizing an action against the State is not to be extended to authorize a seizure of property to satisfy a judgment recovered in such action."[85] Execution or, more generally, satisfaction of judgments depends exclusively on the good will of Congress or State legislatures which are the only organs that can authorize disbursement of funds.[86] For courts to authorize the seizure of public domain property, which is deemed "'out of commerce' and not subject to seizure and sale for satisfaction of judgments" (Patrick III, 1977: 983), remains unthinkable. Qualification of State assets as being in the public interest thereby reinforces the principle of immunity from execution.

The principle of sovereign immunity remains the real basis of immunity from execution, so much so that it cannot be properly understood and evaluated without reference to its historical development. Law reform, even in California, bears the weight of this tradition.

2. The California Reform

The situation in California is very similar to that at the federal level. A statutory scheme of State liability, the *California Tort Claims Act*,[87] was enacted in 1963. Previously, the liability regime comprised a mix of common law and special statutory rules. Prior to this statute, the courts took the lead and innovated considerably (the *Muskopf* and *Lipman* cases[88]).

Since 1963, State liability is derived solely from statute. In the absence of express provisions creating liability, the rule of immunity continues to operate in favour of the Administration; common law rules cannot constitute an alternative source of liability. Fortunately for potential plaintiffs, there are fewer grey areas than elsewhere in the United States, and this statute is often described as "the most comprehensive statutory scheme of governmental liability in the United States" (Klee, 1983: 33). However, immunity still remains the rule in the exercise of discretionary power, as well as in legislative and regulatory matters. Failure to enforce statutes or to proceed with an inspection falls within these exceptions.

As elsewhere, immunity from execution also remains the rule, even if the rules of liability have evolved considerably. Although the *Government Code* provides some rules for payment of a judgment against the State,[89] there is still no way of compelling execution by the State.[90] In principle, "the property of the state is exempt from execution except in those rare instances where a state expressly provides otherwise"

85. 30 *Am. Jur.* 2d, Executions, s. 195.

86. "Since 1977, Congress by statute has provided for the appropriation of whatever funds are necessary to pay all final judgments rendered against the government" (Stewart, 1979: 818).

87. These have become sections 810 and 996.6 of the *Government Code*. On this special scheme, see Nelson and Avnaim, 1974; Chotiner, 1968.

88. Fearful of the consequences of this new precedent, the authorities responded in 1961 with a moratorium (*Moratorium Act of 1961*) which was a prelude to the important 1963 reform.

89. Ss. 912.8, 920 to 920.8, 925 to 926.8, 935.6, 955.5, 965 to 965.4.

90. "The ordinary remedies of a judgment creditor under the *Code of Civil Procedure* are seldom resorted to and are not an effective means to collect a judgment against a public entity" (California, 1980: 1262).

(California, 1980: 1262). The only exception to this principle is at the "local" level (for example, towns and counties, school districts): property that is not used for the public interest is subject to execution process. This shows a concern with adapting execution remedies to the nature of administrative activities.

In its 1980 report, the California Law Revision Commission proposed several important reforms to "the enforcement of claims and judgments against public entities" (*id.*: 1261). The report noted that execution remedies provided by the California Code of Civil Procedure are not available "to collect a judgment against a public entity" (*id.*: 1262). In California, as elsewhere in the United States, the "property of the state is exempt from execution" (*ibid.*), and this may create situations which are harmful to the individual. In the absence of any right to execution, even for monetary condemnations, the individual must negotiate with the administrative entity in question. The latter may set up budgetary imperatives to defer payment. Everything is left to the good will of public authorities, who may ultimately decline to take any positive action that might entail expenses not foreseen in annual budgets.

To give execution creditors a meaningful right to enforce a judgment rendered in their favour, the California Law Revision Commission proposed that all State authorities, whether local or central, be required to pay a money judgment. On the local level, it proposed that the recalcitrant authority be eventually compellable by writ of mandamus (*id.*: 1263). On the State level, however, such a scheme would not work if the finance direction determined that no budget credit was available, for only the legislature can authorize new budget credits. The payment procedure is relatively complicated; the State Board of Control remits money after obtaining a certificate from the finance director attesting that funds are available to satisfy the judgment.

The reforms proposed by the California Law Revision Commission went no further. Indeed, in the chapter on compulsory execution it recommended that "it should be expressly provided by statute that execution and other remedies ordinarily used to enforce a judgment are not available to enforce a money judgment against a public entity" (*id.*: 1262). This is the general rule, no matter how property belonging to public authorities is used. This recommendation takes into account the special nature of State functions, and the fact that previous experience shows that the "levy of execution on public property has not been an effective method of enforcing a judgment against a public entity" (*id.*: 1266). For example, subsection 12.10(c) of the Louisiana Constitution specifies that "[t]he Legislature ... shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure" (Patrick III, 1977: 985).

The changes proposed in California are really quite disappointing. Their principal weakness is that they only contemplate money judgments, and do not propose an overhaul of immunity from execution generally. They also leave in limbo problems that arise when authorities refuse to respect a mandatory judgment. We have already seen in such circumstances that common law remedies, such as the injunction and mandamus, are only of limited effectiveness.[91] American authors consider the current situation to be "a capricious system," a source of arbitrariness and inequality (Patrick III, 1977: 990). They continue to call either for outright abolition of the principle of sovereign immunity (*ibid.*; Zale, 1973), or at least for better safeguards (Stewart, 1979: 845; Ripple, 1971). The gap between its absolute scope and the real dimension of State

91. See *supra*, p. 32. For American law, see particularly Brill, 1983.

activities is currently too broad. If the State enlarges its realm of commercial activities, egalitarian demands aimed at making business dealings more secure are inevitable.[92]

Therefore, the immunity in principle enjoyed by public authorities in common law systems is under attack (Lloyd, 1949). With respect to liability in tort as well as compulsory execution, this immunity has withstood many reforms. Consequently, it is necessary to verify whether "the other system," that of the Continental tradition, has developed other solutions to these problems.

B. The French Reform of 1980

With Law No. 80-539 of July 16, 1980, "*relative aux astreintes prononcées en matière administrative et à l'exécution des jugements par les personnes morales de droit public*,"[93] France has considerably modified the immunity that was previously enjoyed by the Administration.[94] Critics have been quick to hail this victory over another [TRANSLATION] "bastion of Administration privilege" (Linotte, 1981) which has put an end [TRANSLATION] "to the scandal ... resulting from non-execution or delayed execution of courts' decisions by the Administration."[95] Unlike the French civil judge, who has the power to impose damages or to issue an injunction against the Administration (Le Berre, 1979), administrative judges had never arrogated such power to themselves, which is surprising considering their boldness in many other areas. The obstacle seems to have been the principle of separation between administrative courts and administrative action, a feature of the law which contributed to the creation of the Conseil d'État — passage from retained justice to delegated justice (Chevallier, 1970). Administrative judges are not allowed to "act as administrators" by means of injunction or other mandatory remedies (Chevallier, 1972); nor can they directly usurp the Administration by exercising a "reformatory power" similar to that existing in German law.[96] Their self-restraint, an invitation to administrative misconduct, made legislative reform necessary, and this finally came to pass in 1980. Under somewhat different circumstances, legislation to introduce *astreinte* was also enacted in the Belgian (1980) and Dutch (1978) systems. However, in these latter countries the judges themselves undertook to extend its application to public authorities (Moreau-Margreve, 1982: 75).

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92. On this point, there is growing criticism in fields that do not fall within public law, such as private international law, commercial law and business law. These attacks may be more forceful because they are not tempered by the same inhibitions with respect to the phenomenon of the "State."

93. *A.J.D.A.* 1980, 504; *J.C.P.* 1980.3.50161.

94. See *supra*, p. 19. For further comments on the phenomenon of non-execution see Weil, 1965: 254.

95. Tercinet, 1981: 3. See also Distel, 1980; Baraduc-Bénabent, 1981; Bon, 1981.

96. [TRANSLATION] "At the end of the trial, a German pleader whose case is well founded is sure to succeed. The administrative judge has a power of injunction and, in the case of restricted competence, he may change the impugned administrative decision or impose his own where the Administration has remained silent" (Fromont, 1984: 62). See also Eisenberg, 1959. Under Italian law, the administrative judge has a similar power, because he can replace the administrative authority with a *commissaria ad acta* who is entitled to act in the place of a recalcitrant Administration.

1. *Astreinte* in Administrative Law

The relatively large number of refusals to execute judgments (Braibant, 1961; Lefas, 1958), as well as the absence of remedies similar to the mandamus or injunction as it exists in English law (Gaudemet, 1977: 814), help to explain the vigour of the French reform. To give the administrative judge a mechanism to compel the Administration to act, private law techniques were simply extended to administrative law. By allowing *astreinte* against public authorities, the legislator plainly overrode the principle of immunity from execution. *Astreinte* is an effective stimulus to execution, although it is important to note that it is an unusual remedy in that it attempts to reconcile the freedom of the recalcitrant debtor with the need for effective means of pressure.[97]

(a) *The Unorthodox Character of* Astreinte

Astreinte is considered to be an inherent power of the courts. The judge is said to possess both *jurisdictio* (power to state the law) and *imperium* (power to coerce) (Burki, 1979: 40; Esmein, 1903). *Astreinte*, by which a recalcitrant debtor is subjected to a provisional monetary sanction as an inducement to perform an obligation,[98] is particularly appropriate in the case of obligations to act or to abstain from acting. The legal nature of *astreinte* is quite subtile. It is neither an injunction nor an award of damages (Fréjaville, 1951; Raynaud, 1964), and has been characterized in the following translations: "means of pressure" (Baraduc-Bénabent, 1981: 95; Fréjaville, 1951), a "judicial sanction" (Tercinet, 1981: 7; Boré, 1966), a "private penalty" (Kayser, 1953: 244), an "immediate threat" (Savatier, 1951: 37), a "warning" (Fréjaville, 1949: 2-3), a "process of constraint" (Burki, 1979: 40; Savatier, 1951: 40), "a blow" (Moreau-Margreve, 1982: 12). *Astreinte* is not an order to act in a given way, as this is the preserve of injunctive relief. *Astreinte* is a civil sanction (not a fine) that imposes a monetary penalty for failure to respect a judgment.[99] In this way, [TRANSLATION] "it appears as a penalty and as an arbitrary measure of indirect compulsion, expressly conceived to be different from a means of execution" (Le Berre, 1979: 15). This distinction is particularly important, because in France also compulsory execution does

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97. During the *travaux préparatoires* of the Belgian law of 1980, the "autonomous nature" of *astreinte* was used to create [TRANSLATION] "an original means of coercion" (Moreau-Margreve, 1982: 41).

98. Fréjaville, 1949. The power to pronounce *astreinte* was officially accorded to the judicial judge by Law No. 72-625 of July 5, 1972, which adopted the principles set out by the *Cour de Cassation*.

99. [TRANSLATION] "*Astreinte* consists of a monetary condemnation which is necessary to a principal condemnation and conditional upon the inexecution or late execution of the latter. It is said to be definitive when the court irrevocably establishes the amount; it is said to be provisional when, on the contrary, the fact of non-execution has been officially communicated. The procedure is effective because it brings pressure to bear on the debtor who executes the principal decision in order to avoid a monetary condemnation" (Massé, 1984: 661).

not lie against public entities,[100] including industrial and commercial public services.[101] If *astreinte* is not a genuine execution remedy, it may consequently seem ineffective in challenging the general immunity from execution enjoyed by the entire French Administration. Its nature is unique, because it does not involve direct material constraint which, as in the case of seizure, can only be imposed by public powers. It can be available in administrative law without the State's losing its immunity from direct execution. But to the extent that *astreinte*'s function is to compel execution by indirect means, it nevertheless overcomes the hurdle of State immunity. By its nature and its purpose, it is a completely novel form of compulsory execution.

Astreinte is an attractive remedy because it reconciles the need to accord the judge a means of coercion against the Administration while at the same time allowing the latter to enjoy its traditional autonomy. Incidentally, it is this spirit of reconciliation which best characterizes the institution in private law. Indeed, [TRANSLATION] "this method, which consists in requiring the debtor of an eventual judgment to remit a sum of money if he refuses to honour his debt, does not threaten his physical or moral integrity as would be the case with forced execution *manu militari*" (Massé, 1984: 687).

Respect for the debtor's integrity is of particular significance when the latter is none other than the State! In France, [TRANSLATION] "[t]he mechanism of *astreinte* gives the debtor the choice between speedy execution of an obligation and payment of a large sum of money, one which is out of all proportion to the harm which results from non-execution" (Tercinet, 1981: 7). Clearly it is a [TRANSLATION] "private penalty" (Fréjaville, 1949: 1) which in no way prevents a subsequent or cumulative award of damages.[102] As Tercinet points out, it leaves the Administration to draw its own conclusions from censure by the courts, and does not [TRANSLATION] "dictate any specific administrative conduct" (1981: 7). This respect for administrative autonomy is no small matter, for although the Administration is bound to follow the law, it must also have a minimal degree of freedom in deciding how to do so. This concept of indirect constraint is what makes the French reform so interesting.

(b) *Conditions of Application*

The July 16, 1980 statute, like other French legislation, was drafted laconically. Section 2 provides that *astreinte* may be pronounced [TRANSLATION] "in the case of non-execution of a decision rendered by an administrative tribunal."[103] The

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100. [TRANSLATION] "[P]roperty of the administration, public funds and corporal property are exempt from seizure" (de Laubadère, 1980: 515); Jacquignon, 1958. See also Vedel and Delvolvé who note that [TRANSLATION] "there are no private means of execution against the Administration" (1982: 724). Even if several authors affirm categorically the existence of this immunity, Delvolvé still stresses [TRANSLATION] "its uncertain basis and the vagueness of its scope" (1983-84: 129). Concerning its scope, see also Amselek, 1986.

101. Tercinet, 1981: 5. It should, however, be noted that recent case-law allows execution process against industrial and commercial public institutions under certain conditions (Delvolvé, 1983-84: 131; Gaudemet, 1984: 565-9).

102. [TRANSLATION] "*Astreinte* may be added to damages. If *astreinte* itself becomes damages, combination is impossible" (Fréjaville, 1951). See also Baraduc-Bénabent, 1981: 99.

103. See *supra*, note 93.

administrative judge is left to determine what constitutes [TRANSLATION] "non-execution of a decision," and may have reference to a threshold beyond which non-execution is considered manifest.[104] Unfortunately, section 2 does not explicitly take account of situations of partial or defective execution (Baraduc-Bénabent, 1981: 97). It remains for the courts to determine whether these possibilities constitute non-execution. It is important to note that the Conseil d'État is the sole authority to pronounce *astreinte* (section 2).

Section 3 provides that a declaration of *astreinte* may be definitive or provisional. It is definitive when the monetary sanction established by the judge is not subject to any subsequent revision, and is simply prorated to the damages that were actually suffered (Rassat, 1967). This drastic approach is imposed where it is sufficiently clear to the judge that non-execution is due to bad faith or gross negligence. The debtor is in no position to invoke extenuating circumstances. No reduction is possible, and every subsequent day of delay is charged at the "full rate" in calculating the sum that the debtor ultimately must pay. In the case of provisional *astreinte*, the judge reserves the right to revise his order in light of external factors which may influence execution, as well as the debtor's conduct. In principle, *astreinte* is provisional and is only ordered for a limited time period (Fréjaville, 1949: 3). *Astreinte* is measured in periods of time (days, weeks, months) which may be renewed. The judge has complete freedom to set the day which constitutes the departure point.[105] The rate charged is usually quite high in order to penalize the debtor heavily. Section 5 authorizes the Conseil d'État to credit any revenue from *astreinte* either to the petitioner or, in whole or in part, to local communities or groups via a special fund.

Although *astreinte* is a formidable coercive measure against public funds, the reputation of the French Administration is so poor that even other safeguards were legislated. The system of *astreinte* was strengthened [TRANSLATION] "by the introduction of a personal financial liability of the public servant responsible for non-execution," this liability to be imposed by the Budgetary and Financial Disciplinary Court (section 7) (Tercinet, 1981: 10; Bon, 1981: 45). In addition, where money judgments were not executed, it was originally planned to allow the judge a power to

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104. After having been seized of roughly fifty applications for *astreinte*, and still having to rule on the admissibility of an identical number of similar motions, the Conseil d'État gradually developed its position on this subject. For a declaration of *astreinte* to be allowed, it seems that three conditions must exist: (1) the scope of the judgment whose non-execution is alleged must be defined unambiguously; (2) the refusal to comply must be manifested and prolonged; (3) execution of the judgment should not cause more problems for public order than would result from non-execution. See specifically C.E. May 17, 1985, "*M^me^ Menneret*," *A.J.D.A.* 1985, 454 and 399 (chr. S. Hubac and J.-E. Schoettl); Pauti, 1985; D.1985.J.537 (Note J.-M. Auby). A general review of this case-law shows that the judge rejects petitions considered to be premature, above all when the Administration has already initiated execution. Some delay is therefore necessary, and the individual must turn it to his account by summoning (by letter or bailiff's service) the Administration to proceed with execution.

105. In the *M^me^ Menneret* case, *supra*, note 104, the Conseil d'État ordered *astreinte* to come into effect after a two-month delay period which began when the Administration received notification of the Conseil's decision. In so acting, it allowed the authorities concerned time to take the necessary steps to reach an amicable settlement. The effectiveness of *astreinte* ultimately is to be found in its dissuasive aspect.

order allocation of the necessary funds.[106] However, this was considered too revolutionary, because it encroached upon the principle of separation of powers, and was dropped during the legislative debates in favour of the existing section 1, which requires the public accountant to pay automatically. Funds must be allotted during the four months following notification of the decision, failing which the public accountant must do so on his own initiative. This innovation bears some similarity to English law, where the Minister or budget director of some states and provinces must automatically pay a money judgment.[107] This is, moreover, a feature of the California reform.[108]

In general, French commentators welcomed the reform, considering it to represent substantial progress.[109] However, some critics deplore the fact that these new mechanisms require the execution creditor to return to court to get an *astreinte* order (Distel, 1980: 73). Yet the same would be true if mechanisms of private law were admissible against the Administration. Whatever the solution, where there is non-execution, additional action by the individual is inevitable. In the search for reform, could the same be achieved in Canada through a mechanism similar or comparable to *astreinte*?

2. Evaluation of *Astreinte* in the Reform of Canadian Law

Although the French reform does more than introduce *astreinte* to administrative law, the technique is certainly the centrepiece of this statutory scheme. In the study of possible Canadian reforms to immunity from execution, *astreinte* deserves close scrutiny because it was conceived as a solution to analogous problems. First, however, it is necessary to assess whether *astreinte* already exists in Canadian law in some form or another.

(a) *Absence of a Principle of* Astreinte *in Canadian Law*

Because *astreinte* is part of French law, it might be thought that this remedy also exists in Québec civil law. However, it is completely unknown to Québec law. Although Québec has preserved the civil law tradition, the Superior Court, created in 1849, is vested with the powers accorded in England to the "Court of King's Bench," and as such deploys contempt of court (Lemieux, 1981: 18) to repress acts or conduct that might discredit its authority. However, they could quite easily have made use of a civil mechanism such as *astreinte*, because several French execution recourses also appear in Québec law.[110] At the time the Québec *Civil Code* and *Code of Civil Procedure* were

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106. [TRANSLATION] "Enforceable court decisions that have become *res judicata* and that condemn the State, a community or a public institution to pay a sum of money are equivalent to an order to pay the amounts in question.

    The creditor obtains payment of these sums simply by presenting the treasury accountant with a copy of the decision in enforceable form." [Draft statute]

107. Subsection 24(4) of the *Proceedings Against the Crown Act* of Alberta. See also the Saskatchewan (s. 19(4)) and New Brunswick (s. 17(3)) statutes.

108. See *supra*, p. 50.

109. Vedel, Addendum to the seventh edition of *Droit administratif*, 1980: 107. See also Bon, 1981: 50.

110. For elements of comparison, see Vincent and Guinchard, 1981: 735 ff.

drafted, the French civil judges had only begun to assert the right to pronounce *astreinte*. Since there were many objections to this praetorian creation in the legal literature of the time (Le Berre, 1979: 15), it is not surprising that *astreinte* never crossed the Atlantic; besides, Québec judges already disposed of the formidable weapon of contempt of court. Moreover, although section 46 of the *Code of Civil Procedure* is drafted very broadly and gives judges "all the powers necessary for the exercise of their jurisdiction" it is unlikely that *astreinte* could now be ordered in Québec. Section 46 suggests that the Québec judge has considerable freedom in imposing his authority. Probably owing to judicial self-restraint, the courts have held that these powers are only complementary powers necessary for the performance of a principal act (*Association of Food Merchants of Montreal* v. *L'association des détaillants en alimentation du Québec*; *C.T.C.U.M.* v. *Syndicat du Transport de Montréal*). The cases confirm that [TRANSLATION] "this provision's only purpose is to facilitate the exercise of a right by a proceeding that is not incompatible with the rules of the Code, and not to authorize the courts to create any special remedy" (*Vermette* v. *Daigneault*). Such an interpretation is hardly conducive to judge-made remedies.[111]

(b) *Comparison with Contempt of Court Proceedings*

Given the absence of *astreinte* in Canada, it is instructive to compare it with the mechanism that takes its place. French jurists have already observed that *astreinte* plays the same role in French law as contempt of court does in English law (Linotte, 1981; Tercinet, 1981: 10).[112] In both cases, a recalcitrant judgment debtor is forced to respect a judgment under the threat of a severe financial penalty, and, in the case of contempt of court, the possibility of imprisonment. In both cases, the debtor must personally comply with the judgment; execution process does not issue, either against him or against a third person. This explains why in Québec and the rest of Canada contempt of court principally sanctions mandatory judgments such as injunctions. Of course *astreinte* and contempt of court can still be deployed to ensure respect of any judgment which precisely states the obligations of the judgment debtor.

In civil proceedings the two remedies have practical similarities in that they use financial constraint to reprimand non-compliance with judicial orders. However, contempt of court has a more general scope. It can be used to repress any conduct likely to interfere with the judicial system or the authority of a court.[113] By comparison, *astreinte* can be sought only in the case of a failure to execute a judgment. After all, it was created specifically for this purpose. Taking the analysis a step further, one can see differences in the nature of the sanction imposed. *Astreinte* is essentially a monetary penalty that the judge may order in civil proceedings. Although commentators have frequently reasserted the existence of civil contempt, contempt of court is above all

111. In a fairly recent case, the Québec Superior Court refused to innovate using section 46 of the *Code of Civil Procedure* order to repress a case of violation of *res judicata*, specifically an interlocutory injunction (*Commonwealth Plywood Cie Ltée* c. *Conseil Central des Laurentides*).

112. On this point, we have our doubts that French and Canadian law can be reconciled based on a comparison between *astreinte* and injunction, as is suggested by Massé, 1984: 660.

113. On the distinction between contempt *in facie* and *ex facie*, see Popovici, 1977: 47.

criminal in nature as it may lead to imprisonment. This latter dimension of contempt of court has been noted by the Law Reform Commission of Canada, which favours its "criminalization."[114]

Consequently, although their purposes are similar, *astreinte* and contempt of court are quite different. Contempt of court is by nature repressive and accusatory, with criminal law overtones, whereas *astreinte* is one of a range of execution recourses, although it does have a special status. Contempt of court is retrospective, because it is intended as a definitive sanction for an accomplished fact, while *astreinte* is prospective, because essentially it contemplates performance of an act. Here a money judgment is subordinated to some principal obligation. Unlike the peremptory and definitive nature of contempt, *astreinte* is more orientated towards a specific end. Fundamentally, it is a pressure tactic to obtain real compliance with a judgment. As a means of financial pressure, it therefore has no real counterpart in English-speaking countries.

As a civil remedy for failure to execute judgments, *astreinte* deserves serious study. In 1949, Street noted that "this measure [the author referred to it as a 'pecuniary judgment'] seems to be the most progressive yet adopted for the enforcement of judgments against this government, and the adoption of a similar rule in the British Commonwealth merits careful consideration" (1949: 44). In the contemplation of new solutions, *astreinte* should be the subject of more detailed examination, specifically from the standpoint of the issue of civil versus criminal sanctions. We return to this theme in Section II: II. *Recognizing a Right to Execution.*

II. *Academic Commentary*

Under English law, sovereign immunity from execution has rarely raised much critical interest. Some deem this further evidence that no problem exists. Harlow does not agree, and considers that "the English are distressingly inclined to feel that problems which are not discussed do not exist." On the contrary, "this problem does exist and needs discussion in order to alert public opinion to its existence" (1976: 133). This author's efforts do not compensate for such prolonged silence, and only infrequently and indirectly — for example, in general comments on Crown privileges and immunities — has there been any perceptible reaction. Even if the Crown's privileged status were to come under general attack, it is hardly possible to find any real desire for change with respect to execution against the Crown.

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114. Canada, LRCC, 1982: 43 and 21. Even if the Law Reform Commission of Canada agrees that civil contempts remain appropriate where a judicial authority is impeached, it nevertheless recognizes the preponderance of criminal law in contempt of court matters. With the tabling of Bill C-19 in February 1984, the Commission's recommendations have been largely adopted by the authorities, because the new section 116 of the *Criminal Code* would provide that disobedience of "a lawful order" made by a court would be an indictable offence or one punishable by summary conviction (sections 131.1 to 131.22 of the Bill reflect the importance accorded to criminal procedure). If the new Government eventually intends to follow up on it, this legislative reform may be the culmination of an evolution that has already been apparent for some time.

Taking an overall view in the light of comments from throughout the Commonwealth, the United States and France, some major points do stand out. The basic problems are the same everywhere. There is general criticism, to differing degrees, of immunity from execution, all with a view to enhancing protection for the individual. Few commentators believe or hope that the courts can correct this situation on their own.[115] Legislative reform is the generally preferred solution.[116]

Proposals for reform often favour monetary sanctions. For example, Harlow considers that English law has ignored the possibilities provided by traditional damage suits, adding that "French law shows that damages in administrative law have the double purpose of compensation and sanction" (1976: 133). Indeed, French authors have proposed [TRANSLATION] "introducing liability of the *puissance publique* as a convenient means of ensuring the effectiveness of judgments to quash" (Josse, 1953; Braibant, 1961: 64). American writers make similar observations. Stewart has attempted to deduce a remedy in damages from the general formulation of the fifth amendment to the Constitution, which states that private property may not "be taken for public use without just compensation" (1979: 824). She goes even further in stating that this constitutional renunciation of sovereign immunity logically implies allowing the courts a power of compulsory execution: "The fifth amendment compels the conclusion that the same courts which are commanded to state the results of its protection be empowered to enforce those results" (*id.*: 825). American judges, however, do not see things the same way. Faithful to the English public law tradition, they require clear and express abrogation of sovereign privileges by appropriate legislative bodies.

The prospect of monetary sanctions or damage judgments has aroused critical interest. The result is no surprise. Virtually everywhere, jurists are trying to reconcile existing immunities with the need to provide the courts with effective sanctions. Few have supported an unreserved use of means of compulsory execution against the State or against public organizations.[117] Rather, the general tendency has been to promote mechanisms that can compel and punish the authorities yet without suppressing privileges which seem indispensable, in light of the special nature of administrative action. Respect for existing immunity is often implicit in nature. Many reformers venture no comment whatsoever on the very relevance of immunity from execution. Its continuation appears self-evident, and this only begs the question. It is as if the weight of historical tradition and particularly powerful psychological obstacles render inappropriate the very idea of a critical reappraisal. Irrational factors may well play a role in reforming the legal status of the Administration (Canada, LRCC, 1985: 26-7), making recourse to an approach that is directly based on contemporary reality inevitable.

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115. This was particularly the case in France, where some commentators invited the Conseil d'État to accord itself the power to pronounce *astreinte*. On this point, see Chevallier, who notes that [TRANSLATION] "legislative intervention does not seem to be indispensible: it would be enough for an administrative judge ... to improve the scope of his review" (1972: 89).

116. In this respect, it is worth noting that the insistence of French legal literature in denouncing the few isolated cases of non-execution helped contribute to a major reform.

117. [TRANSLATION] "There is no reason to justify the immunity from seizure of property which is used by a public body or corporation in the normal course of executing its mission. On the contrary, the threat of seizure may have a beneficial effect by disciplining careless or negligent administrators; it is, moreover, a measure of equity for creditors and there is no reason to frustrate them" (Garant and Leclerc, 1979: 521).

Section II: The Reality of Modern Administration

The above review shows that reform is possible. Other countries have faced identical problems and have endeavoured to resolve them. With the exception of two Australian states to which reference has already been made (see *supra*, note 73), no foreign reform actually permits compulsory execution against State authorities.[118] Even in the Netherlands, where the State has no immunity, [TRANSLATION] "some property has been judged to be essentially too public in nature to be subject to means of execution of ordinary law" (Paques, 1983: 434). Generally, the possibilities of coercion by the courts are only indirect in nature, with immunity remaining the rule. As the latter's strengths and weaknesses have not been directly evaluated, our study cannot lose sight of this fundamental point. The real question is, therefore, whether private law rules of compulsory execution should apply to the federal Administration as a whole, or whether they should be adapted to the special nature of administrative action.

I. *The Problem Defined*

Although it may seem to impeach the dignity of the State, subjecting the federal Administration to ordinary execution process must at least be discussed. Of course, there is considerable resistance to the idea of compulsory execution against public authorities (Paques, 1983: 434). Is it not "going against nature" to allow the seizure or sequestration of State property?[119] And yet this is the view of one school of thought in administrative law which is no longer convinced of the special nature of the Administration. Nevertheless, the radicalism of this solution is no more than the inevitable counterpart of existing immunity. The excessive rigidity of both approaches ignores the intrinsic pluralism of the modern Administration. The varied nature of

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118. This strict principle has been somewhat eased in some systems. For example, in Italy a distinction in the *Civil Code* has been made between "domain" (*demanio*) and "estate" (*patrimonio)* with respect to State, provincial and communal property. Although the domain remains inalienable and not subject to seizure, the estate is divided into "unavailable estate" and "available estate." The unavailable estate consists of property that cannot be subject because of its location (dams, bridges, roads, public buildings and so forth), therefore remaining exempt from seizure. On the other hand, the available estate, such as State income (interest, rents, duties) may be subject to compulsory execution. There is a similar distinction in German law. The German Federal Republic *Code of Civil Procedure* distinguishes between "administrative estate" and "financial estate" (the famous "Fiskus" theory from ancient law). In the latter case, it must be clear that the State does not act as the public power in participating in legal relationships of private law (*allegemeiner Rechtsverkehr*). Although the first category encompasses property that is essential to the fulfilment of public service missions, the second is made up of property administered to generate revenue. The federal authorities enjoy total immunity, while the *Länder* remain subject to compulsory execution. Such a distinction in English law only applies to local authorities (municipalities and school commissions, for example) using the traditional public/private domain dichotomy.

119. [TRANSLATION] "It remains unthinkable to subject the public Administration to the general scheme of compulsory execution process with respect to certain items, because of the principle of inalienability of public domain property that is used on behalf of the collectivity. Because the latter is the real owner of State property, the public interest and the proper operation of essential services cannot be sacrificed in order to satisfy the interests of a single individual" (Garant, 1985a: 968).

administrative action dictates a differential approach, one that can best reconcile the extension of individual rights and liberties with the untroubled operation of public services.

A. Pitfalls of the Egalitarian Approach

Although scholarly comment on the subject is still somewhat amorphous, the egalitarian approach reflects the Administration's evolution over the last several decades. In Western countries, this period has been characterized by the involvement of the State in what are traditionally private sector activities. At the same time, the special nature of administrative action has been far more relative than in the past. Under existing law, positing a rigid distinction among human activities based on whether their objective is public or private would be no simple matter. Few activities intrinsically belong to either the public or the private sector. Because the deck has been reshuffled and old distinctions made more relative, the application of private law rules to public authorities deserves consideration.

In American law, Ripple (1971) took this approach in his critique of the theory of "sovereign immunity"[120] by which, prior to 1976, foreign States enjoyed complete immunity from execution. The development of international trade was hardly compatible with such immunity because the American law enabled foreign Governments to avoid their commercial obligations. The result was injustice and a lack of protection for many American businessmen. He concluded that "the principle seems no less sound that when a sovereign takes the character of a private citizen, its commercial obligations should be enforceable in the courts of the United States."[121]

Although this approach does not require that the entire domestic Administration be subject to rules of private law, it still breaks with tradition in contemplating an egalitarian system for activities similar to those of the private sector. It is hardly surprising to find claims to equal protection when the State is involved in industrial or commercial activities. And this is only one step away from a purely "egalitarian" approach to all administrative action. Deprived of its attributes as the Crown or the *puissance publique*, the Administration is reduced to the status of an ordinary debtor. As early as 1949, dealing with the specific case of execution of judgments, Street favoured the application of private law to the State (1949: 47). In 1936, in a minority report by a Canadian Bar Association committee, it was suggested that "the most obvious way of facilitating the enforcement of judgments against the Crown is to allow execution against the Crown."[122] Not only was this generalization not accepted, it was

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120. On this concept, see *supra*, p. 46.

121. Ripple, 1971: 382. In support of this position, he refers to the reasoning followed by the Supreme Court in 1984 in *Bank of United States* v. *Planter's Bank of Georgia*:

> It is, we think, a sound principle, that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

122. Report of the Committee on Provincial Legislation and Law Reform, 1936 (referred to by Street, 1949: 41).

bluntly rejected in the drafting of the *Crown Proceedings Acts* (see *supra*, notes 4 and 5). According to Street, "it may be that some assets employed in connection with the exercise of less important government functions could be liable to execution without undue prejudice to the public interest" (1949: 42). The possibility of direct compulsory execution against Administration property, even if only partial, is certainly thinkable. Even in France, where the myth of *puissance publique* might be presumed insurmountable, Tercinet has considered that bad faith on the part of the Administration [TRANSLATION] "can only really be overcome by allowing execution process against public bodies."[123]

This egalitarian approach takes a confusing form in Canadian case-law. Compulsory execution has been permitted against entities which cannot claim the status of Crown agent, or, despite the recognition of this status, cannot for other reasons claim one of the privileges normally granted to the Crown.[124] A correct application of the law in determining the legal status of the entity in question often leads to surprising results. If the "egalitarian" approach were to be adopted, property vital to the collectivity would be subject to seizure, as an astonishing precedent dealing with hospitals indicates. While the common law associates hospitals with the public interest, the immunity from compulsory execution enjoyed by such institutions is not absolute. The Supreme Court decided as much in the *Westeel-Rosco* case when it granted judgment in a mechanics' lien action. Because the hospital's board of directors was not a Crown agent, Their Lordships agreed that a lien may give rise to a claim to the hospital's holdback money, although Mr. Justice Ritchie added that "any sale of the hospital property in the present case 'would be clearly contrary to the public interest and should not be permitted'" (p. 245). He concluded that "the ultimate recourse for

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123. 1981: 13. For industrial and commercial public institutions, some problems in applying the law of July 16, 1980 motivate Delvolvé to admit [TRANSLATION] "the need to allow common law execution process to be used against them under the same terms as against private individuals" (1983-84: 134). The French judicial judge shares this point of view, as is shown in a recent case in which compulsory execution by garnishment was allowed against funds held by the State railway: Paris C.A., July 11, 1984; S.N.C.F.C. *Groupement régional des A.S.S.E.D.I.C. de la région parisienne*," *D.* 1985, 174.

124. An action based on the unconstitutionality of a statute may eventually provide an argument in favour of allowing execution process of Crown privileges and immunities obviously depends on its validity. In *B.C. Power Ltd.* v. *Attorney General of British Columbia*, the Supreme Court authorized appointment of a receiver to administer the assets of a private company, the B.C. Electric Company. The effect of this measure was to influence the monetary interests of the Crown, because the latter claimed to have rights to the shares and assets of the company following a nationalization process. As the principal dispute concerned the constitutionality of the nationalization laws, the receivership order thus appeared as a provisional measure applicable to all parties to the dispute, including the Crown. However, in light of these facts, immunity from execution does not really appear to have been threatened for two reasons: (1) the receivership order was not aimed at property belonging directly to the Crown, but in reality at private property on which the latter claimed to have rights; (2) relying on the unconstitutionality of a statute in order to overcome immunity from execution is, at the very least, a rather difficult approach whose applicability is limited. The *Amax Potash* case is a good example. While awaiting a decision on the constitutional validity of a taxation statute, an application aimed at obtaining a provisional preservation order directed specifically at the Government of Saskatchewan was dismissed. Had there been a favourable response, the court was afraid this would amount to a ruling on the merits of the principal dispute!

    Recent case-law of the Supreme Court may favour the advent of restrictive solutions with respect to immunity from execution. Relying on the *Eldorado* case, it may be that Crown agents are unable to invoke immunity from execution when they commit illegal acts or fail to act within the framework of statutory objectives. All of this still remains hypothetical, as the *Eldorado* case, in which the concept of legality was interpreted very liberally, clearly shows.

the enforcement of the mechanics' lien is recovery from the proceeds of the sale of the property'' (*ibid.*). By allowing satisfaction of a lien from the hospital's holdback money or by recourse to judicial sale, the judgment clearly recognizes the principle of compulsory execution against an institution of this type without, however, accepting all of its implications, notably seizure. In this way, obstacles created by the ''public interest'' have been reduced but in a way that seems to ignore its real significance. Normally institutions (such as hospitals), whose functions are eminently social in nature, should be sheltered from compulsory execution. The Manitoba Court of Appeal took such a view in declaring in *Re Shields and City of Winnipeg* that the City of Winnipeg's streets and sidewalks could not be subject to any mechanics' lien, invoking ''the public interest'' and ''the paramount right of the public.''

In any case, *Westeel-Rosco* confirms a line of authority which seems to give insufficient consideration to the public interest in property held in the public domain. Several recent cases follow this approach. In 1981, the Québec Court of Appeal agreed that a schoolhouse belonging to a school commission could be charged with a supplier's privilege or lien:

> Under present conditions when public bodies are engaging more and more in matters which were considered to be in the private and commercial domain, the tendency appears to be to restrict rather than extend immunities of the Crown and the public domain. (*Alain Lavoie Ltée* c. *Léo Lisi Ltée* 297)

To see an analogy between education and commercial or industrial activities is astonishing, unless schools are viewed as educational supermarkets![125] A recent case dealing with the Gatineau Hospital is even more surprising (*West Island Plomberie et Chauffage Ltée* c. *Volcano Inc.*). Not only was the supplier's lien on the hospital allowed to stand, it was also held that the exemption from seizure provided by article 1980 of the *Civil Code* was not available.[126]

When these cases are compared with other decisions on the same topic, inconsistencies in current law are revealed. That is, despite deploying the same methodology for determining the status of Crown agents, courts sometimes afford entities engaged in Crown business complete immunity, as in the case of *Saskatchewan Government Insurance Office*. These inconsistencies result because existing law mainly relies on formal criteria, rather than substantive standards grounded in a functional characteristic of administrative action.

The desire for stricter control over Crown privilege has not had particularly happy results. There is a danger in such an egalitarian tendency, which does not take into account administrative action whose object or purpose lies beyond the realm of private law (see Canada, LRCC, 1985: 59). In the interests of realism, some consideration of the nature of administrative action is clearly required.

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125. There is no point in blaming the court because the *Education Act* hardly left any other alternatives.

126. The judge did not directly rule on [TRANSLATION] ''whether this body is a Crown agent'' in order to reach this result. He confined himself to noting that for construction work it was not subject to Government control, so much so that it acted as a simple ''ordinary corporation'' becoming thereby subject to rules of private law. By a literal analysis of enactments, Crown agents may thereby lose some traditional immunities without the judge giving any special consideration to the purpose of their mission. This interpretation seems too narrow, because it takes no account of the public interest associated with hospital property, something which is essential to the public.

B. Characterizing Administrative Action

The above review suggests that some administrative action may well be exposed to execution process without the public interest being affected. When the State operates gas stations and casinos, is involved in mineral prospecting, undertakes the sale of alcoholic beverages and organizes lotteries, it would seem safe to characterize these generally as commercial and industrial activities of an administrative nature. However, it is not easy to identify where the public or private interest begins and ends.[127] Nevertheless, problems in locating this frontier are no reason to dismiss an approach which isolates administrative activities of an industrial or commercial nature. This frontier is best marked, not by invoking traditional organic and formal classifications, but by applying a functional standard: the purpose of administrative action.

1. A Purposive Distinction

As a general rule, a purposive distinction between commercial and public services has not found favour with either courts or legislatures — the formers' attitude being ultimately conditioned by the latters' incoherence. The prevailing distinction, between the "Administration associated wholly or partially with the Crown" and the "Administration which is not the Crown," has a purely institutional context, one that follows its own logic and that pays little or no heed to the purposes of administrative action. From an historical standpoint, these control criteria have managed to replace purposive criteria in the identification of Crown agents.[128]

There have been some signs of change, however. The recent *Act to amend the Financial Administration Act in relation to Crown Corporations* has introduced purposive distinctions which take into account the nature of administrative activities. As already pointed out in Working Paper 40 (Canada, LRCC, 1985: 54), there is now a recognized distinction between industrial and commercial activities ("Crown corporations") and purely administrative activities ("departmental corporations"). The public/private distinction is also well entrenched in local Government law (Hutchins and Kenniff, 1971), suggesting a possible alternative to the current scheme.

A dual system exists in the local Government law of several American States. There, property in the private domain may be subject to compulsory execution if no

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127. [TRANSLATION] "If we do not immediately see why the State may continue to enjoy the privilege [immunity from compulsory execution] when it is involved in the activities of an individual, it is still clear that the line separating it from the public interest, which was once limited to the classic prerogatives of the State, has slipped in our time so as to include assistance to businesses and sometimes commercial competition" (Paques, 1983: 435).

128. For an analysis of this evolution, see specifically Garant and Leclerc, 1979: 493. As the authors show, the failure of the "functional standard" results from growing divergence between the appreciation of the judge and the purely political choices of the legislator: [TRANSLATION] "[The functional standard] is hard to reconcile with the fact that the legislator has intentionally qualified some institutions as Crown agents that are analogous to those to whom the courts have precisely refused this qualification" (*id.*: 498). This impasse may only be provisional, to the extent that the so-called "control" standard meets with equally decisive failure for not taking into account the nature of administrative activities.

public purpose can be demonstrated.[129] Unfortunately, recent developments show that this distinction is being gradually dropped in favour of a total immunity for all property, irrespective of its real purpose (see *supra*, p. 50, the example of California). In Canada, the principle of "dual domain" also has been adopted in municipal law (Hutchins and Kenniff, 1971). Yet this distinction should not be overstated. Not only does it not apply to State property (Brière, 1969: 340; Dussault, 1974: 467), it is evident that it is not incongruent with the distinction between "purely administrative" and profit-oriented activities. Everything has its own logic, the former being more concerned with the domain and the realm of property. Despite these differences, the theory of dual domain is a helpful referent in arguing for a distinction based on the purposes of administrative activities.

Even more important in the recognition of a functional distinction is the Canadian Parliament's enactment of the *State Immunity Act*. Section 5 of this Act states very simply that:

> A foreign state is not immune from the jurisdiction of a court in any proceeding that relates to any commercial activity of the foreign state.

As Turp notes, this statute [TRANSLATION] "meets the requirements of the contemporary business world" (1982-83: 176). With the expansion of State commercial activities on the international scene, maintenance of State immunity would be unfair to private individuals dealing with various State authorities. Throughout the world, it is [TRANSLATION] "these new imperatives which have guided national legislators towards solutions that tend to restrain sovereign immunity in the area of their commercial activities and to confine it to its original scope, namely genuine acts of the public power" (*ibid.*). In Canada, as in Great Britain[130] and the United States,[131] property of foreign States that is involved in commercial activities no longer enjoys immunity from execution (*State Immunity Act*, s. 11(1)). Such a growing dichotomy between acts of *imperium* and managerial-type acts carried out for profit might usefully be applied in public domestic law between purely administrative activities and industrial and commercial activities.

Still preoccupied with whether the immunity of foreign States is relative or absolute, English-Canadian case-law has not really accepted a purposive distinction in

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129. In Louisiana, for example, prior to the 1960 constitutional amendment, "the courts distinguished property owned by local entities as falling into either the public or private domain as determined by the use of the property" (Patrick III, 1977: 983). This purposive conception had the effect of making immunity from execution relative. "Since it was serving no public purpose, private domain property was often deemed subject to seizure and sale to satisfy the debts of the local government entity" (*ibid.*). On the other hand, the public domain was exempt from compulsory execution. For example "waterworks, courthouses, jails, taxes and school grounds were not subject to seizure since these were dedicated to public use" (*ibid.*).

130. *State Immunity Act 1978* (U.K.). See Delaume, 1979.

131. The United States *Foreign Sovereign Immunities Act* of 1976. On this point see von Mehren, 1978.

domestic law.[132] A recent decision of the Court of Appeal once again sets Québec apart from the general trend (*Sparling* c. *Caisse de dépôt et placement du Québec*). It adopts, for the purposes of domestic law, the theory of relative immunity that now reigns in international law.[133] Mr. Justice Tyndale indicates that: "There exists a theory to the effect that when the Sovereign puts aside his crown, so to speak, and descends to compete in the market place, his special rights, prerogatives and immunities remain with the crown and he becomes an ordinary subject of the law like his competitors" (p. 169). He adds that "[t]he doctrine has usually been applied to foreign sovereigns in international cases and not to the Sovereign or the Crown within the state" (*ibid.*). Nevertheless, he concludes (p. 170) that "the doctrine of relative or restrictive sovereign immunity, according to the weight of authority, [the Court of Appeal cites its own precedent[134] and some authors] is now part of our domestic public law. One of the reasons for the adoption of such relativity [*jure imperii* versus *jure gestionis*] was the expansion of the activities of foreign government agencies and their entry into the commercial field."[135]

Whatever its future in domestic law, the distinction between the public and the commercial is becoming more and more accepted internationally. Canada no longer enjoys immunity from execution in its commercial activities with its trading partners, Great Britain and the United States. Foreign States that have signed a reciprocity treaty are bound by the same system in Canadian territory. Given the widespread acceptance of this distinction, its transposition to domestic law seems inevitable. For reasons of coherence and simplicity, it would appear to be the solution of the future. Canadian courts would then be able to apply the same rules to State commercial activities, whether these are within an international or purely domestic context. A solution of this type is inevitable, because commercial activities have expanded to such an extent that their confinement to one State alone is at the very least illusory. And this is particularly applicable to Canada: the intensity of its commercial relations with the United States, Japan and the European Economic Community can only encourage such a uniform and coherent system.

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132. *La République démocratique du Congo* v. *Venne* remains marked by Mr. Justice Laskin's strong dissent in favour of relative immunity. See also: *Ferranti-Packard Ltd.* v. *Cushman Rentals Ltd.*; *Corriveau* v. *Republic of Cuba*. The *Eldorado* case may even be interpreted as a rejection of relative immunity. There, Mr. Justice Dickson observes that:

> The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is *prima facie* immune. The Court must give effect to the statutory direction that the Crown is not bound unless it is "mentioned or referred to" in the enactment.
>
> Without referring to the principle of immunity, the Ontario Court of Appeal has already denied the C.B.C. the right to avail itself of its position as Crown agent on the grounds that the case concerned commercial activities (*Baton Broadcasting Ltd.* v. *C.B.C.*).

133. The Québec Court of Appeal was the first to reject the theory of absolute immunity for foreign States, deeming it to be [TRANSLATION] "outmoded and unacceptable" (*La République démocratique du Congo* v. *Venne* 827 (Q.B.)).

134. *La République démocratique du Congo* v. *Venne*; *Zodiak International Products Inc.* c. *Polish People's Republic*.

135. He adds: "In my view, such reasons apply with equal or greater force to the principle of Crown immunity within Canada, and I would adopt the implication of this Court in *Zodiac* and give it as my opinion that the Crown is not immune from legislation under Section 16 if its agent is acting *jure gestionis* rather than *jure imperii*" (p. 170).

For these reasons, *we propose that federal authorities, especially the Government and the Administration, no longer enjoy any immunity from execution for their industrial and commercial activities. As for administrative activities that are closer to the traditional conception of* jure imperii (benefit-granting function, planning function, regulatory function, police and control function, and so forth), *immunity should remain the rule in order to protect the public interest* (Garant and Leclerc, 1979: 496). Although a distinction between administrative and commercial functions is relatively easy to conceptualize, it is necessary to propose some criteria for making its application.

2. Criteria for Distinguishing the Public from the Commercial

Assuming a system which draws such distinctions, nevertheless it would be incorrect to assume that some activities intrinsically fall within the realm of State (public) actions, while others belong to the private (commercial) sector. This mistaken assumption, and its concomitant, the "theory of public service by nature" (Vedel and Delvolvé, 1982: 134) have caused major problems in French administrative law. Points where the private and public sector overlap are both subtle and complex. Be that as it may, this overlapping does not impede a better rationale of law and administrative activities. Far from being a monolith, the State has many dimensions (Friedmann, 1971). Some administrative activities are oriented principally towards profit or industrial objectives, while others lie within the traditional framework of public service objectives. Therefore, rather than attempt to ascertain whether a particular activity normally is undertaken by the public or private sector, it is preferable to identify its industrial or commercial nature on more functional grounds.

On this point, the *State Immunity Act* does not provide any helpful definition. It defines "commercial activity" as "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character" (section 2). Clearly, Parliament has preferred to let courts, who have played an active role in attempting to confine the scope of immunity to extracommercial activities (*acta gestionis* versus *acta imperii*),[136] develop the distinctions. The courts should continue to play a major role in systematizing and clarifying the meaning of industrial and commercial State activities. Moreover, there is probably no single criterion in this area for identifying and classifying such activities. Possible indicators include the following.

— *Legislative intent*: This traditional technique can help identify the nature of the duties assigned to the Administration. Some caution is in order, because Parliament often uses expressions that ring of the general interest to cover State activity based principally on the profit motive. The *Petro-Canada Act* is a good example.

— *Search for profit*: Is the State involved in an activity dominated by financial considerations? Does it obtain financial gain through mechanisms that are similar or comparable to those of the private sector? This is the capitalist function of the State, with purpose or objective (a teleological criterion) being the test.

136. On the controversy marking the introduction of this distinction, see Kos-Rabcewicz-Zubkowski, 1974; Simmonds, 1965.

— *Performance of commercial transactions*: Normally, industrial or commercial services are involved in commercial transactions on a large scale. This is an important indicator serving to identify activity which is not purely administrative.

— *The purpose of the activities*: Do the activities in question represent a service to the community or are they simply a manifestation of the State's own "private interests"? Although the postal service is involved in commercial operations and the search for profit, it cannot be listed among commercial and industrial activities because it is a service to the community that the State seeks to make more profitable for reasons of sound administration. On the other hand, the marketing of fish by public firms, or the operation of a lottery system, might not initially appear to be services rendered to the community.

This distinction between administrative and commercial is not a panacea, and no doubt some problems of interpretation will arise. But given existing law, and the evolution of the modern world, it is the best solution possible, one that is far and away superior to traditional classifications based on whether the entity has the legal status of the Crown. Just as the trier of fact must determine whether an entity is a Crown agent, he should also be allowed to rule on the commercial and industrial activities of the administration. Only such a distinction can properly contend with the contemporary State in all of its dimensions. This distinction will be particularly helpful in the development of a scheme of immunities better suited to the genuine nature of administrative activities. In Working Paper 40, the Commission implied that private law might eventually apply to the Administration, if the context were favourable. That is, once the court has determined that a dispute is of an industrial or commercial nature, there should be nothing to prevent the application of ordinary execution process to the federal Administration.

II. *Recognizing a Right to Execution*

A major part of the problem of immunity from execution is solved simply by the classification of administrative activities in the manner suggested. For industrial and commercial activities the Administration will, in principle, be subject to execution process. On the other hand, for purely administrative activities the problem is unresolved. Not only would recognition of a right to execution hardly seem compatible with the nature and purpose of so-called general interest activities, it might also ignore the fact that such activities are generally governed by special rules of public law. In both their function and their general scheme, these rules are somewhat removed from the "normal" realm of private law. This special situation favours development of a distinct set of rules.

Even though the operations of the Administration are essentially matters of public law, we must cease to rely solely on public interest arguments to exclude change. Individuals are entitled to tangible means of ensuring that hard-earned rights are recognized. The problem then is forcing the Administration to respect *res judicata* while not at the same time coercing it with normal means of compulsory execution. Some new solutions are required if we are to resolve this dilemma.

A. Potential Solutions

Negligence and bad faith on the part of the Administration can only be answered with pressure tactics, whether these be direct or indirect. In the Administration's case, its privileges, its special status, the weight of tradition, not to mention the inhibitions of jurists, can easily lead to more indirect means. Of course, this is the traditional perspective of public law. Concepts such as the "Crown" (Great Britain and Canada), "sovereign immunity" (United States) or *puissance publique* (France) seem to exclude automatically any direct constraint. Unlike in German law (see Eisenberg, 1959), however, the general principles of our public law do not permit the courts to usurp the Administration by decreeing the fulfilment of an administrative act or the performance of certain works. But these principles do not prevent a judge from making an order against an administrative authority,[137] subject to any privileges that the latter may be able to set up. The scope for coercion of public authorities is, therefore, much broader than is generally imagined.

1. Indirect Means

Coercive means include injunctive relief, judicial orders, monetary sanctions and the imposition of penalties. Out of consideration for the Administration's sensitivity, courtesy may dictate mere incitement or indirect pressure. A narrow construction of existing law ("no person may give orders to Her Majesty") may also lead to favouring such forms of recourse. Mechanisms of this type to promote respect of *res judicata* do exist.

The mildest form of indirect pressure is undoubtedly public reporting of cases of failure to comply with judgments. As part of an analysis of various conciliation techniques Harlow has examined the French use of "Reporting Commissions" (1976: 128). Prior to the 1980 reform, the relatively large number of cases of non-compliance had already pushed French authorities to resort to stronger safeguards. In 1963, a *Commission du Rapport* was set up to make an annual report of cases of inexecution on behalf of the Conseil d'État.[138] This straightforward technique consisted in drawing public attention to cases of non-compliance, to stimulate criticism of the Administration. However, the public was generally unaware of this mechanism, and its effectiveness was debatable (de Baecque, 1982-83: 183); it failed to generate sufficient fear among a recalcitrant administration. Within the Canadian context, such a "blacklist" would also be of limited value since it would not give a legally executory remedy. Moreover, instances of blatant non-execution are so infrequent that publication of such a list would

137. As we have seen, an injunction directed against a Crown agent is henceforth admissible under certain conditions. See *supra*, p. 36.

138. Même, 1968; Vedel and Delvolvé, 1982: 728. Pursuant to Decree No. 85-90 of January 24, 1985 (J.D., January 25, 1985, 1043), this commission has become the sixth section of the Conseil d'État under the title [TRANSLATION] "Report and Study Section." Its functions are the preparation of an annual report, the conduct of specialized studies and the settling of problems with execution. This change in status confirms the importance of the work carried out by the old commission. As Costa (1985) notes: [TRANSLATION] "These three functions ... constitute, for the Conseil, a new activity, one that is original and modern because it is adapted to problems of operation, and of dysfunctions, of an increasingly complex administration."

not *a priori* seem to be particularly useful. However, the impact of a reporting system could be significant, on the lines of the censure of the Administration by the Auditor General before Parliament. The French Reporting Commission did, in fact, play a very positive role by accepting numerous applications for clarification or intervention from the public and even the Administration itself. Many problems were resolved in this way, without the dispute moving into the forum of public debate (*id.*: 184). Moreover, the concept of an independent arbiter suggests other possibilities.

Thus, one might wish to assign the task of reprimanding administrators who refuse to comply with judicial orders to an independent administrative body. An "Ombudsman"-type solution comes to mind. At first glance, the approach seems attractive. The Ombudsman reports on situations where individuals have been wronged by administrative action. His mandate extends beyond purely legal questions, and includes authority to consider more informally any wrongful or unreasonable acts, something which is often difficult to control through the courts. Quite positively, Garant describes this control mechanism as [TRANSLATION] "an advice for the lovelorn column dealing with the often tense marital problems of the Administration-Individual couple" (1985: 553). There may, therefore, be a greater role for the Ombudsman in cases of non-compliance. Under existing law, it is a problem that the courts cannot readily resolve. In Great Britain, "several cases of failure to implement judgments of administrative tribunals have already been referred to him [the Parliamentary commissioner]" (Harlow, 1976: 132). In France, the law of December 24, 1976 empowers the *Médiateur* [TRANSLATION] "to request that the entity in question execute a final court decision" (Vedel and Delvolvé, 1982: 728). But where the Administration refuses, the *Médiateur* can only respond by preparing a "special report"!

Even if the general experience with Ombudsmen has been encouraging, it is nevertheless an uncertain solution to the problems addressed by this study. Why should a reform in the area of execution be contingent upon creation of this new institution? Reassessment of immunity from execution should remain an autonomous process, and ought not to depend on other complementary reforms. In addition, is it really possible to use the Ombudsman to promote tangible guarantees in the area of execution? In light of foreign and Canadian experience, the relevance of this type of control seems questionable. The Ombudsman has neither jurisdictional authority nor a direct material power to compel the Administration. As Wade notes, "he is in no sense a court of appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon a citizen's grievances" (1982: 74). The Ombudsman proceeds essentially by recommendations; these cannot be executed (Garant, 1985: 542). It is difficult to imagine how he can resolve a problem that requires a form of direct constraint in order to force action or abstention. Furthermore, should not such a power to compel the Administration, because of its scope and nature, rest with the courts? If the issue is defiance of judicial orders, should not the courts be given effective remedial powers?

Another conceivable indirect method might be to impose a regime of personal liability for public servants and administrators. Out of pride, stubbornness, bad faith, malice or self-interest, a State functionary may defy a judgment or distort its effects by incomplete or incorrect execution. His attitude may cause harm which is actionable in tort. However, to grant liability there must be genuine gross negligence, because some cases may result simply from ignorance or carelessness about judicial decisions whose meaning and scope may have seemed incomprehensible. Although there are few cases on this subject, English and Canadian courts have long permitted recourse to tort

actions against individual administrators.[139] Indeed, "there is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of powers, deliberate maladministration, and perhaps also other unlawful acts causing injury" (Wade, 1982: 669). Of course the classic case is *Roncarelli* v. *Duplessis*, where a liquor licence was cancelled for illegal grounds, bad faith and abuse of power. A similar result could be expected where an administrator's bad faith in refusing to execute a judgment can be established. The personal liability of administrators is often thought to be effective in ensuring a minimum of respect for the law and in guaranteeing a satisfactory level of competence among public servants (Linden, 1973: 162).

Yet this type of recourse cannot be the basis of a satisfactory model. The grounds of liability alone are a minefield strewn with the countless immunities that benefit federal public servants as individuals.[140] Moreover, proving wrongful behaviour in an administrative context leads to additional problems, because the administrator's conduct may well have been dictated by management imperatives and the exercise of administrative discretion. Furthermore, it is difficult to envisage the personal liability of Crown agents, given that existing immunity reduces their duty of care to a low level. Nor is the effectiveness of personal liability at all clear, because such a remedy does not result in execution of the judgment but simply payment of monetary compensation, something we can presume would hardly be equivalent to the doing of an act or the abstaining from doing an act for the individual. Again, since civil servants are not deep-pocket defendants, no satisfactory compensation can be guaranteed. As for its appropriateness, widespread recourse to such a remedy would create the impression that execution is merely a function of the personal will of those concerned, whereas in reality their attitude is largely conditioned by external factors such as budgetary rules. Equally, an approach based on personal liability ignores how the Administration operates. Any important decision involves the participation and agreement of various levels of the bureaucracy, making individualization of liability highly doubtful. Given the complex web of services and departments, it is preferable to seek a more direct means of compulsion whose target is the Administration itself.

2. Direct Means

Even though the wholesale application of execution remedies to the federal Administration must be ruled out, other recourses remain open. A variety of sanctions may be deployed to coerce public authorities. But since compulsory execution depends on compulsion, the use of these sanctions must have a principled justification.

(a) *Legitimacy of Compulsion*

Initially one confronts theoretical problems. Is indirect coercion less coercive than compulsory execution? Eventually, a refusal to allow normal execution process will lead to indirect acceptance of the principle. Yet concepts of constraint and coercion

139. For English law, see particularly McBride, 1979: 324. For the Canadian context see Ouellette, 1975.

140. See Pépin and Ouellette 1982: 521. These immunities have been listed by Dyke and Mockle in *Inventaire général des privilèges et immunités de la Couronne et de l'Administration fédérales contenus dans les lois fédérales*, LRCC, internal document, 1983.

may vary considerably. Sanction, fine and imprisonment are coercive remedies that are not part of the traditional panoply of execution remedies. Clearly, there are two quite distinct concepts of compulsion. Direct compulsion exists to bring performance of a specific act. Punitive compulsion, within the context of an omission, provides civil or penal sanctions for non-performance of an act or non-respect of a duty. Direct compulsion differs from punitive compulsion, whose basis is repression. Their underlying principles are not the same, the latter having a repressive function, the former mandatory purposes.

If remedies such as injunctive relief, seizure, and execution by the court constitute varying forms of active or mandatory compulsion, civil or penal sanctions are more closely associated with punitive compulsion. Contempt of court proceedings belong to the latter category because they sanction an attitude or an omission that impeaches the authority of a court. These sanctions have a certain attraction because they allow indirectly what cannot be obtained directly. Even if the main purpose of any sanction is above all repression, civil and penal sanctions still have a dissuasive aspect. It would, therefore, be wrong to conceive of them too statically, as little more than the imposition of a penalty. The concept of sanctions may play an active role without undermining the fundamental principles that prevent direct compulsion of the Administration. Sanctions arrive principally after the fact, and because of their scope they go beyond the mere performance of an act. From the standpoint of execution of judgments against the Administration, they are of special interest, in light of the problems that would result from total abolition of immunity from execution.

In principle, it is possible to make the entire federal Administration subject to sanctions, thereby further attenuating the residual areas of immunity from execution. An additional advantage of this solution is that it does not overturn fundamental principles which govern the powers of the courts (see *supra*, p. 13), and would therefore appear to respect the Administration's autonomy.

(b) *Penal or Civil Sanction*?

If this kind of compulsion is accepted, questions remain as to what type of sanction is appropriate. Reprehensible conduct may be sanctioned in many ways. Among judicial sanctions, there is a choice to be made between criminal or civil measures.

Traditionally, the Administration, the Government and the Crown are not subject to criminal proceedings. As Chitty once pointed out, Her Majesty cannot charge herself, any more than she can be subject to an arrest warrant or imprisonment (1820: 374). We have already seen that this rule is not absolute, since Crown agents are now subject to criminal charges if the acts committed are not part of their duties (see *supra*, p. 41). Conceiving that refusal to execute a judgment could be a criminal offence offers a new perspective.

This type of offence already exists in the form of contempt of court proceedings, which have an accusatory dimension that is principally criminal in nature (see *supra*, p. 39). Bill C-19, tabled in the spring of 1984, treated this sanction as a criminal offence. In the first chapter of this work, however, we ruled out the idea of using contempt of court proceedings against the Crown. Failing a radical change in the constitutional status of the courts and the Crown, it is hard to imagine Her Majesty

being in contempt of herself under existing law. It would probably be unconstitutional, and require a fundamental revision of the basics of Canadian public law. Because of its parameters, this study cannot consider such profound modifications.

Even if contempt proceedings were permitted, their very nature would generate new problems. Created to deal with cases of "contempt in procedure," contempt is directed above all at individuals, because it relies on physical restraint. Even if such means were eventually applicable to corporate entities (company personnel, for example), this type of coercion is not adapted to the special context of public authorities.

Refusal to execute a judgment might also be enacted as an ordinary criminal offence. However, this course of action should also be rejected. Criminalization would not reflect the real nature of the problem. Since in administrative law cases of refusal to execute arise in civil proceedings or in administrative proceedings (administrative tribunals), the appropriate sanction for such problems should be civil in nature. A simple technique, in the form of a collateral proceeding, would be required.

Consequently, our approach should be towards a basically civil sanction. But between ordinary means of compulsory execution and contempt of court, is there a compromise solution that respects both the special nature of the State and the need for tangible safeguards for the individual? It is here that the French institution of *astreinte* is attractive.[141] By subjecting the Administration to financial sanctions for non-compliance with a judgment, the judge would be respecting both the authorities' freedom of decision making and the integrity of State property. In return, such a mechanism would offer the individual an effective recourse which the Administration could not long resist. It is therefore appropriate to conceive of a new technique that would also be based on financial pressure.

B. Strategies for Reform

Fundamentally, the proposed reform would be based on reconciling the various interests involved. On the one hand, an overly absolute recognition of the superiority of the interests of the State over those of the individual would be abusive; on the other, it would be going too far to claim that all rights must be vested in the individual. As we have already suggested, immunity from execution must be maintained in the case of purely administrative activities. Generally, the latter consist of essential services which cannot be disrupted to satisfy the interests of a single individual. Its theoretical underpinning is no longer a form of State positivism (the State, the State-in-itself), but rather the interests of the community. Conversely, the individual is entitled to execution of a judgment, even where the debtor is the State.

1. The Search for Effective Execution Remedies

Effective execution does not necessarily imply resort to direct force. It is simply a matter of encouraging full compliance with judgments. It should not be forgotten that the whole issue of non-execution is a complicated one. The Administration has subtle

141. See *supra*, p. 52.

means available to it in order to avoid the effects of a judgment. Rather than adopt repressive measures that would deal with all possible forms of non-compliance, it would be preferable first to establish a legal obligation upon the Government and the entire federal Administration to respect judgments rendered. Similarly, some boldness might be shown in specifying that this duty should not deprive execution creditors of any rights acquired through judgment. Such provisions would amount to a statement of principle and as such would provide a tangible basis for effective execution.

In the case of money judgments, minor amendments are in order. The current discretion of the Minister of Finance whether to pay such judgments should be abolished.[142] Money judgments should be payable by force of law, making resort to compulsory execution redundant. However, in cases where very large sums are awarded, public finances should not be destabilized by sudden outflows of funds, especially in the case of independent administrative agencies and public enterprises which manage their own budgets. To cope with this danger, the California system gives the authorities the possibility of making installment payments. This innovation specifically contemplates the situation of "local entities," whose financial health is far more precarious than that of the State of California. To this effect, the California Law Revision Commission recommends that: "A local public entity is now required by statute to pay a tort or inverse condemnation judgment and may pay the judgment in not exceeding ten annual installments where necessary to avoid unreasonable hardship" (California, 1980: 1263).

As we frequently hear in the news of lawsuits in the millions of dollars taken against federal authorities,[143] it would be quite appropriate to enable them to soften the impact of a heavy condemnation. Because the State's responsibilities are different from those of private individuals, and because it manages public funds, this relatively minor privilege would seem suited to the special nature of its functions. More simply, the payment of certain judgments should not put public finances into a precarious position. This reservation means that the possibility of installment payments should not depend on the judgment creditor's agreement (*id.*: 1264). Private individuals should not determine how public funds are to be used. The option to proceed by installment payments over a period not to exceed five years, should be left to the discretion of federal authorities.

As for mandatory or prohibitive judgments, alternatives have already been proposed in this chapter. Under private law, the recalcitrant debtor is exposed to execution process. Nothing of the sort exists for an important part of the federal

142. Provided for by: *Crown Liability Act*, s. 17(2); and by *Federal Court General Rules*, Rule 1800.

143. As a recent example, the Federal Court (Appeal Division) awarded $650,000 to two private companies that originally claimed $2,520,000 for loss of profits and $3,400,000 for loss of equity following the breaking of an agreement by the federal authorities: *R.* v. *CAE Industries Ltd.* At trial, they had succeeded in obtaining a judgment for $4,300,000! As another example, the 1983 Canadian public accounts indicate a payment of $2,600,000 by the Treasury Board as an out-of-court settlement for the victims (grouped in trust) of the crash of a Boeing 737 at Cranbrook Airport in February 1978 (34.13). Internal compilations made between 1971 and 1983 for the central Administration alone show that monetary condemnations against the federal authorities are particularly important in the following sectors: Transport, National Defence, Office of the Solicitor General. For 1983, these three areas accounted for condemnations whose totals were $3,038,000, $3,207,000 and $1,533,000 respectively. If we attempt to calculate everything the federal State pays each year in damages, on behalf of both the central Administration and autonomous entities and public companies, we are talking about several dozen million dollars. For 1983 alone, payments made to cover damage caused by the central Administration amounted to $18,848,000.

Administration, which enjoys total immunity by its association with the legal status of the Crown. The gradual erosion of this artificial scheme has tended to show that it is barely justifiable for a part of the Administration. Maintaining this privilege is unwarranted where administrative activities are industrial or commercial in character. Moreover, these should be subject to ordinary execution process not only where there is non-compliance with a judgment, but also in the normal course of proceedings which includes detention and other measures of preservation. Of course some exceptions might be in order, specifically with respect to property held by the State for military purposes.

The special nature of "purely administrative" activities makes extension of ordinary private law rules difficult. Existing immunity for these services should be maintained, but the immunity rule should be redrafted in completely new terms. For reasons that have already been set out in Working Paper 40 (Canada, LRCC, 1985: 31), it should no longer be the Crown that enjoys this immunity, but rather its real beneficiaries, the Government and the Administration.

With this proposal to preserve immunity from execution for so-called "purely administrative" action, we are taking into consideration imperatives inherent in the carrying out of certain public responsibilities which are essential to both the Administration and the public. However, these imperatives should not stand in the way of a bold new approach. Rather than recreate an absolute immunity, Parliament should enact only a relative immunity. If immunity from execution for "purely administrative" action were restated in rigid and unequivocal terms, there would be a danger that immunity would far too often remain the rule for most State activities, even industrial and commercial ones. It should not be forgotten that these two dimensions, commercial and public, are often closely bound together, and occasionally this makes distinctions based on the nature of administrative activities very delicate. For this distinction between the commercial and the administrative to result in significant change, a more fundamental reform must be considered. To ensure that reform brings tangible results, the principle of immunity ought to be turned around by making immunity a relative concept. Even if immunity will still exist in principle, why not recognize the *administrés*' definite right to execution, thus presenting the issue in a positive way? All State property should be subject to compulsory execution, with two restrictions (with such an approach, immunity from execution is no longer an absolute principle but becomes instead a contingent, relative rule):

(1) Some exceptions might be expressly enumerated by statute.

(2) Where compulsory execution takes place, the authorities would be able to file an exception in court which, for lack of a better term, could be called the "public service exception." This option would only be available to the creditor after a judgment is rendered, immunity from execution remaining the rule during the course of the proceedings.

This second point needs elaboration. Quite simply, some objective criteria whose scope and application would be left to the court, should govern invocation of the exception. Often, everything depends on specifics, requiring an examination of the real situation. When a judgment is violated, State property would be liable to ordinary execution process, unless the administrative authorities against whom judgment has been rendered demonstrate to the court's satisfaction that the property in question is essential to the organization and operation of the "public services." Immunity for purely administrative

activities would thus become relative.[144] Where industrial and commercial activities are involved, a simple identification of the nature of the activity in question would be sufficient to legitimate compulsory execution. In all cases, however, compulsory execution would not be allowed without leave from the court. In the case of non-compliance with a decision handed down by a quasi-judicial body (an administrative tribunal), the power to decide whether or not compulsory execution is necessary should rest with the Federal Court.[145]

In this proposal, the traditional immunity of the Crown would disappear in favour of new rules for the federal Administration as a whole. Exposure to compulsory execution would depend on the nature of administrative action. However, this would not allow execution process to issue indiscriminately against any service, department or entity at the federal level. Only the administrative entity that has been the subject of the judgment should be liable to execution process. Such a restriction is needed to avoid, for example, a situation where a creditor seizes Agriculture Canada property used in industrial and commercial activities, when the recalcitrant judgment debtor is really another department, Supply and Services Canada. In the scheme proposed, only the property of Supply and Services Canada would be potentially subject to compulsory execution (on condition, of course, that Supply and Services Canada was not engaged in "purely administrative" action).

This proposal creates a subsidiary problem. Although most independent administrative agencies and public enterprises have their own legal personality despite the fact they are also Crown agents, the same is not true with the central Administration. Under existing law they have no legal personality distinct from the Crown, and the Attorney General of Canada often acts in their name before the courts. Sometimes it is the Minister responsible per se who is being pursued; this question of the absence of legal personality can be evaded to the benefit of the status of Minister of the Crown.

This helps explain the problem with introducing a reform based on functional and substantive criteria (the nature of administrative action). Yet the problem could be overcome, were the statute to specify that only entities or departments involved in a dispute could be subject to compulsory execution.[146] Provided a reservation of this type is clear and express, there is no reason it could not be incorporated into a special scheme of public law.

The need to grant judgment creditors the right to effective execution invites compromise. The French reform of 1980 provides a good model. While preserving an immunity identical to the present Crown immunity, this reform allows the Conseil d'État to compel the Administration, using financial sanctions, in cases of non-compliance. It is appealing to endow the Canadian courts with an analogous power. While the amount of the sanction should be fairly high to make it effective, the court should be permitted to consider mitigating circumstances and reduce the amount of the

144. As Belgian writers have pointed out: [TRANSLATION] "Debate is an ideal way to bring out patrimonial, budgetary, financial and functional elements which are to be considered in determining whether or not such execution is admissible" (Le Brun and Déom, 1983: 270).

145. In 1980, the Law Reform Commission of Canada made clear its position that only the Federal Court should be responsible for all judicial reviews of federal administrative authorities (1980: 44).

146. Similarly Garant notes that: [TRANSLATION] "Execution of judicial decisions [condemnation to do or not to do] would be greatly facilitated by the designation of an administrative body or statutory corporation against whom such judgments would be pronounced" (1985a: 954).

condemnation at the time of final judgment. This new mechanism of financial pressure would in no way be a substitute for genuine execution pursuant to the terms of the main judgment. It would only be a way of pressuring the debtor to execute the judgment with the threat of an expensive financial sanction. This dissuasive element is very important, because statistics from the French Administration show that *astreinte* is only rarely used. What is important above all is its role in the case of non-compliance.[147] Were such a mechanism created, there would be two judgments. The first, a provisional one, would simply establish the amount of the sanction, to be computed daily from a date fixed by the judge. The second, a final one, would be payable by right according to conditions applicable to money judgments, and would establish the definitive amount of the sanction, while at the same time taking into account circumstances surrounding the delay in execution. As this monetary sanction is not a fine, it would not be remitted to the State, an absurd result in any case; rather, it could be forwarded for example to a fund for scientific or legal research. Finally, as the sanction is not a judgment for damages, nothing would prevent a further action for damages resulting from non-compliance.

The proposed reform is aimed at reconciling the interests of all parties concerned, as much as this is possible, while at the same time avoiding any major upheaval in the fundamental principles of public law.

2. The Special Case of Compensation (Set-Offs)

From a public law perspective, even if compensation is not a part of all compulsory execution actions, it remains closely linked to the rules governing immunity from execution, especially in terms of its underlying rationale and practical implications. In an overall re-evaluation of immunity from execution, the fate to which we should consign this notion of compensation ought to be considered.

Compensation for set-offs is a private law notion whose effect is to permit two debts to cancel each other. Although it is basically the same under civil law and common law, its scope differs in the two legal systems. The civil law of obligations places compensation among the various ways of extinguishing obligations — articles 1187 to 1197 of the *Civil Code* (Baudouin, 1983: 495). Two parties who are mutually creditor and debtor of each other may in this way settle their reciprocal debts. No meeting of minds is required, because compensation takes place simply by effect of the law.[148] Compensation may take place under civil law without there necessarily being any ongoing litigation. This is not true in the common law. At common law, "set-off" is a defence or "cross-claim" and occurs within the context of a lawsuit. English law

147. [TRANSLATION] "In several cases, a solution was found during the proceedings which brought the plaintiff to desist in his action and we may consider that this rapid and favourable result is due to the pressure brought by the individual's claim to have the Administration condemned to an *astreinte*" (de Baecque, 1982-83: 192).

148. Article 1188 of the *Civil Code* provides that:

> Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality.
>
> So soon as the debts exist simultaneously they are mutually extinguished in so far as their respective amounts correspond.

distinguishes between "set-off" and "counterclaim" (*Halsbury*, 1983, Vol. 42: 239 ff.). "Set-off" is limited to monetary compensation (the same restrictive meaning as in civil law) whereas "counterclaim," as its name indicates, allows defendant B to answer plaintiff A with any lawsuit or claim he may have against A in the civil law; the cross-demand or *demande reconventionnelle* has a more limited scope because it requires a claim resulting from the same source as the principal suit (*id.*: 241).

Within the context of relations between the Administration and the individual, this mechanism could provide attractive extrajudicial safeguards (Canada, LRCC, 1985: 77). Under existing law, it is not open to private individuals because the Crown enjoys total immunity against any claim for a common law set-off. Under civil law things are not so clear.[149] Compensation may be a mode of extinguishing debts, but it is also an indirect method of compulsory execution, above all from a public law standpoint. This reasoning is used to justify non-application of compensation to the Crown. Décary notes that "since as a matter of law no execution shall issue on a judgment against the Crown, a claim against the Crown is never demandable and thus is not amenable to compensation, since compensation presumes two debts that are liquidated and demandable" (1976: 321). Compensation necessarily involves execution, because if A invokes it he may lead B to execute his obligation. Within this meaning, compensation takes the form of an indirect means of execution. Indeed, B may be forced to fulfil his obligation at a time and under circumstances which are far from favourable to him. In this way, the Crown could be compelled to execute against its will; hence, the link with compulsory execution.

Crown immunity from compensation or set-off is also based on textual arguments. As no federal statute subjects it to this mechanism (Décary, 1976: 323; Dyke and Mockle, 1983), we are left with the traditional immunity of common law. Failing an express provision to the contrary, immunity remains the rule. Some decisions have clearly confirmed this privileged status (*Morley* v. *Ministre du Revenu national*; *Fortier* v. *Langelier*). Immunity may be absolute in scope with respect to the federal Crown, especially considering that Crown Proceedings Acts in Great Britain and the English-Canadian provinces have already settled the matter with express provisions. In general, this legislation has somewhat relaxed the rule of Crown immunity.[150] But it still applies in respect of every claim for compensation in fiscal and criminal matters.[151] Conversely,

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149. Pursuant to sections 94 to 100 of the *Code of Civil Procedure*, nothing expressly reserves the rights of the Crown in this area. Should we deduce that section 94 applies in the absence of contrary provisions? It states that:

> *Any person having a claim to exercise against the Crown*, whether it be a revendication of moveable or immoveable property, or a claim for the payment of moneys on an alleged contract, or for damages, or otherwise, *may exercise it in the same manner as if it were a claim against a person of full age and capacity, subject only to the provisions of this chapter*. [Emphasis added]

This doubt is also justified because compensation is not a right that is essentially litigious.

150. See, for example, subsections 17(5) and (6) of the Saskatchewan statute, and subsections 19 (1) and (2) of the Alberta statute.

151. As shown by the New Brunswick *Proceedings Against the Crown Act*, s. 14(5).

> No person may avail himself of any set-off or counterclaim in proceedings by the Crown for the recovery of taxes, duties, or penalties, or avail himself, in proceedings of any other nature by the Crown, of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties.

the federal Crown has been granted this right, at the expense of the individual, by several federal statutes (for example, *Excise Tax Act*, s. 52(9), *Canadian Forces Superannuation Act*, s. 7(8), and *Unemployment Insurance Act, 1971*, s. 48).

The appropriateness of these Administration and Crown privileges must, therefore, be questioned. The legal and practical reasons usually raised in their defence are far from convincing. On the legal level, it is difficult to imagine how compensation undermines the principle of immunity from execution. All provincial statutes allow exceptions that benefit the individual yet maintain immunity from execution.[152] This is hardly surprising, because compensation is, above all, a form of double payment serving to facilitate particular commercial and banking transactions (Baudouin, 1983: 495). It is difficult to argue that a mechanism for settling debts is a type of compulsory execution.

However, from a practical standpoint, the rule is justified by potential administrative problems. As Décary points out, "an administration would be embarrassed if compensation were permitted with respect to claims attaching to different departments" (1976: 328). Yet this does not seem to bother the authorities when money must be recovered from individuals, as subsection 39(6) of the *Canada Pension Plan* reveals:

> Instead of making a refund that might otherwise be made under this section, the Minister may, where the person to whom the refund is payable is liable to pay tax under the *Income Tax Act*, apply the amount of the refund to that liability and notify such person of his action.

Given increased centralization, mechanization and computerization of the federal Administration, administrative arguments are not convincing. Any individual should be able to claim compensation against the entire federal Administration, even if the debts do not involve the same administrative entity. To give a concrete example, a person ordered by the courts to remit a sum of money to Agriculture Canada may invoke the right to compensation for the income tax rebate he is expecting from Revenue Canada Taxation. In this specific case, Agriculture Canada would be obliged to communicate with Revenue Canada to make the appropriate adjustments. Since all funds, both revenue and expenses, are currently transferred between federal departments and agencies, it seems that this suggestion would not disrupt budgetary rules. Nonetheless, feasibility studies should be undertaken to ascertain the viability of this reform. Since there are no legal obstacles to amending the Administration's privileged status, future studies done by accountants and actuaries may well be most enlightening on this issue.

Several secondary questions restricted to matters of law are still unresolved. The first arises with respect to the type of debt which may be compensated. Within the perspective of reinforcing the right to compensation, should all obligations be covered by this right, even those resulting from taxes or fines? On this point, private law does make some exceptions (for example, article 1190 of the *Civil Code*). A more technical

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152. Set-off is allowed if the two claims relate to the same department or entity, as subsection 14(6) of the New Brunswick statute shows:

> No person may, without leave of the court, avail himself of any set-off or counterclaim in proceedings by the Crown unless the subject matter of either the set-off or counterclaim relates to a matter under the administration of the same minister or Crown corporation as the matter with respect to which the proceedings are brought by the Crown.

problem may result where there are multiple debts. Should an order of priorities be considered? Again, should public authorities be able to pay the debt in installments? With respect to total compensation, this particular right is no longer relevant because both debts are deemed to merge and cancel each other. For the balance that has not been compensated, one should reluctantly permit public authorities to pay by installment, under the conditions and for the reasons noted earlier, since such a possibility is not generally available for the State's debts. In the special context of money judgments, this ability to pay by installment is justifiable as a way of avoiding significant and unpredictable disbursements from the funds of an independent administrative agency or a public enterprise. At the present we are not prepared to specify any particular method of paying compensation, nor do we wish to restrict it to a definitive list of requirements and obligations even if this may possibly exclude taxes and fines.

Of all these questions, the most important remains the scope to be given to this new safeguard. Should it be permitted only as a litigation plea (the common law approach) or should it be available to unlitigated debts by simple effect of the law where both debts are demandable (the civil law approach)? In Working Paper 40 the Commission indicated a preference for safeguards that would also cover unlitigated debts, referring to the fact that non-curial relations between the Administration and the individual are the rule and litigation the exception. Indeed, compensation is an area that is well suited to the creation of non-curial procedures. In order to strengthen significantly the *administrés'* position, the establishment of a positive entitlement to compensation for debts that are due would be worthwhile. As a general principle, all debts between the Administration and the individual should be subject to compensation by simple effect of the law, except as expressly provided for by statute. This right to compensation would be valid against the entire federal Administration, with all reference to the Crown excluded for the same reasons as those explained previously. For social reasons, such a right should apply only to physical persons since the purpose here is to improve and democratize relations between the State and individuals. Finally, debts should be subject to compensation even where they originate from Government authorities with distinct legal personalities. In such a case, the two departments involved would have to make the necessary arrangements for the reimbursement of the funds disbursed in compensation.

Conclusion to Chapter Two

With a few rare exceptions, Western countries have barely modified their public law in the area of execution. This situation is in clear contrast to public international law, where a distinction between management activities and State activities proper (*jus gestionis* versus *jus imperii*) has become quite generalized. The distinction renders the old immunity to process that was systematically invoked by foreign States against the courts of another country more relative, and exposes property used for commercial purposes to execution process. It now applies in Canada by virtue of the *State Immunity Act*.

The same type of distinction should be introduced in domestic law, because recent decades have been marked by a considerable increase in industrial and commercial activities of the Administration. It is hard to continue justifying the traditional Crown

immunity for the Government and the Administration with respect to this class of activities. Yet when these activities represent genuine State functions in which the objectives of public policy and the general interest are present, existing immunity should be maintained, although it should be restated in new terms. The concept of the Crown is no longer of any use in distinguishing between the administrative and the commercial.

This partial maintenance of traditional immunity should be relaxed somewhat by granting additional remedies to judgment creditors. Administrative authorities should be subject to financial sanctions when they defy or only partially comply with a judgment. Distinct from damages, the only purpose of these judge-ordained sanctions would be to compel the Administration to comply with the original decision. They would constitute a financial penalty (a civil, not a penal one) that the judge could set as he saw fit. This approach enables the importance and the purpose of administrative action to be reconciled with the imperatives of the proper operation of the judicial system.

General Conclusion and Recommendations

At first sight, immunity from execution would seem immune from reform. Although this immunity is at present linked to the Crown, its rationale depends mainly on the special nature of the State, the Government and the Administration. Because historical reference to the Monarch as an individual is no longer very useful, arguments in defence of immunity now tend to be grounded in legal positivism. Relying on the apparently special nature of the State, some jurists have adopted absolutist justifications which cut short prospects for reform. Some consider it unthinkable that public force could be used against the authority which is its very source, while others consider the possibility of execution against the State to be a serious encroachment on the principle of separation of powers. Still others feel that State sovereignty would be compromised, and that the orderly management of public finances would be undermined. To give these arguments currency, reference is made to the general interest and proper operation of the Administration. Finally, some even invoke the dignity of the State, the functioning of the Administration, the need for mutual respect between the courts and the Administration, judicial self-restraint, appropriateness, and even bureaucratic sensitivities in support of immunity. From neo-positivism to pure pragmatism, by way of various views of the State and of judicial control, the resulting situation is hardly favourable to reform. Therefore, it comes as no surprise that immunity from execution has remained the rule in most Western countries.

By contrast, public international law appears to have taken a decisive turn marked by the suppression of immunity from execution with respect to State activities of a commercial nature. By distinguishing between *gestio* and *imperium*, a dualist view of State activities has made a previously too absolute privilege merely relative. Domestic law, on the other hand, has largely opted for organic and formal standards, to the detriment of a more functional approach. Consequently, the prevailing trend in English-speaking countries has been to avoid distinguishing types of administrative action. How could it have been otherwise, since the notion of the Crown has always been predominant? Because all State functions are in some way or another associated with the Crown, it is difficult to introduce a new distinction based on the nature of State activities. In this respect, the present study confirms one of the major orientations of Working Paper 40. Therefore, in proposing standards that are fully adapted to the real nature of administrative action, any reference to the concept of the Crown must be dropped. *Present immunity must be reassessed and restated in terms that do not refer to the concept of the Crown. Any attempt to modernize this area of administrative law requires a direct evaluation of administrative action and a clear and explicit designation of the real beneficiaries of existing immunity, namely the Government and the Administration.* In Working Paper 40, the Commission clearly stated its resolve to undertake the decisive step of defining a new legal status for the federal Administration. *The crucial point is whether the federal Administration can still invoke an immunity formerly attributed to the Crown.* The focus now has changed, and only the activities of the Administration should be at issue.

In order to propose substantial modifications, any legislative provisions which serve as a basis for immunity from execution would first have to be repealed. More specifically, these are section 6 and subsection 17(1) of the *Crown Liability Act*, subsection 56(5) of the *Federal Court Act* and section 18 of the *Garnishment, Attachment and Pension Diversion Act*. These provisions should be replaced by a new series of enactments. The easiest solution would be to group them with a view to *the introduction of a new statute on the legal status of the federal Administration*. This proposal is a part of the work which the Commission is carrying on with a view to elaborating a new legal status for the federal Administration. As such, it remains inseparable from the overall approach.

Content of the Reform

Although non-compliance with judgments by Canadian public authorities is still a relatively rare occurrence, this does not obviate the need for reform. Given existing law, there are two specific reasons for this.

The first results from an elementary concern with modernization. Rather than take for granted the propriety of the authorities, it is important to question the very relevance of immunity from execution. As handed down by tradition this immunity no longer reflects contemporary legal preoccupations and is ill-adapted to the commercial nature of some administrative action. The overly general nature of this immunity should be corrected. When the State becomes involved in industrial or commercial activities for lucrative purposes, traditional arguments in favour of immunity from execution no longer apply. Because this commercial dimension is obviously not synonymous with public order, the general interest or the special nature of the State, nothing would seem to stand in the way of liberalizing the existing scheme of immunity. In some way, this amounts to a recognition of the multidimensional nature of State activities.

The second reason relates to the concept of safeguards. Alongside a concern with adaptation to administrative action is a desire to provide the judgment creditor with effective remedies to ensure the execution of judgments. In this area, existing law leaves many questions unanswered. An important part of the federal Administration may indeed refuse to comply with judicial decisions without there being any genuinely effective way to respond. Here is a source of potential abuse: [TRANSLATION] "The very idea that the Administration may ignore *res judicata* with impunity amounts to questioning the most fundamental principles of liberalism" (Distel, 1980: 71). We must stop being naïve about the effectiveness of judicial and parliamentary control. It is time to recognize the validity of specific safeguards for the public.

From the standpoint of an overall reassessment of the legal status of the federal Administration, this shortcoming in administrative law should be corrected. Far from succumbing to a romantic vision of judicial review, the approach proposed by this document is based on the principle that such control should be a tangible reality capable of bringing about concrete results. Compliance with court judgments is a categorical imperative that can only be attained by providing the individual with effective safeguards. These must go beyond merely Platonic censure by the courts. As Sir Edward Coke suggests in *Franklin's Case*, "when the law gives anything to anyone, it gives also those things without which the thing itself would be unavailable" (p. 47a). In this vein, outdated myths according to which, as Thiers put it, [TRANSLATION] "the

State must always be deemed solvent and an honest man'' must be eschewed. Rather, situations in which the State, ordinarily a good debtor, may for economic or political reasons be tempted to ignore a judgment must be anticipated.

To reach this end, the proposed reform must attempt to reconcile the legitimate interests of the individual with those of the Administration and the Government. To be effective, our various suggestions should lead to a new statute[153] comprising the following provisions.

(a) *Recognition of the Authority of Judicial Decisions*

By virtue of Crown privileges and immunities, the federal Government and a large part of the federal Administration enjoy a special status with respect to compulsory execution. This situation abets public authorities who deploy refined techniques to avoid the consequences of a judgment. *Therefore, the authority of judicial decisions should be unequivocally recognized, not only to eliminate potential dangers of abuse, but also to offer a minimal legal basis for a successful response to certain Administration tactics*. This reform is obviously no panacea. By imposing a positive duty on the authorities, however, it does provide a safeguard that should not be taken lightly. *This provision is so important that we intend to propose a system in which immunity from execution will be maintained for an important part of administrative and governmental activities*.

***Section 1*: The Government and the Administration shall comply with judicial decisions.**

Where there is either outright refusal or incomplete execution, *such a provision would provide a minimal legal basis for an action in damages*. The courts should have authority to evaluate, on the facts of each case, what constitutes proper execution.

(b) *Automatic Payment of Money Judgments*

Under existing law it is difficult to determine whether the Minister of Finance has any real discretion with regard to the payment of money judgments. *There is no reason why all money judgments should not be payable by the Minister of Finance upon demand. However, we do not wish to create problems in the area of public funds, more precisely for the balancing of the budgets of independent administrative agencies and public enterprises. If this imposes unacceptable financial consequences, public authorities should be entitled to make installment payments*. Subsection 17(2) of the *Crown Liability Act* should therefore be repealed and replaced by a new provision.

***Section 2*: In a final judgment, any award of money made against the Government or the Administration is payable as of right upon presentation of a certificate of the court to the Minister of Finance.**

For judgments greater than X (amount to be determined), the Minister of Finance may make payments by installment over a period not to exceed five years.

153. This is required because of the rule by which privileges and immunities of the Crown cannot be amended except by express legislative provision.

(c) *Liberalization of Immunity from Execution*

Until now, there has never been any question that administrative authorities associated with the Crown benefit from immunity to any form of compulsory execution. The recent adoption of the *Garnishment, Attachment and Pension Diversion Act* has reduced somewhat the broad scope of this immunity. As for the federal Administration that is not assimilated to the Crown, all ordinary means of compulsory execution are admissible as in litigation between private individuals.

This distinction leads to a largely incoherent result because immunity from execution does not depend on the nature of administrative action. A variety of Crown agents may successfully claim this immunity, even when they are engaged in industrial and commercial activities. Yet other authorities have no immunity, even when they provide essential services to the public. *This situation should be rectified by the adoption of new standards that can reflect the true nature of administrative and governmental action.* A substantial change is required because immunity from execution developed when State activities were very confined and strictly public in nature (this was the limited context of the *État-gendarme*). *At the present time, the diversification of State activity fully justifies modifying the law on the basis of a differential treatment for different administrative functions.*

The 1982 *State Immunity Act* introduced a type of relative immunity for foreign States based on the nature of their activities. Consequently, they no longer have any immunity for commercial activities (sections 5 and 11). This approach deserves to be extended to domestic law. *Where the State acts as a businessman, it should be treated as one. Therefore, a decisive step should be taken by allowing normal execution process with respect to administrative action of an industrial or commercial nature.*

On the other hand, *with respect to other administrative action*, which we consider to be "purely administrative" because it traditionally falls within the purview of the State (administrative police function, benefit-granting function, regulatory function, and so forth), *immunity from execution is more easily justified.* In these areas, concepts of public order and community service are intimately interrelated. For example, items used for military purposes should normally be immune from compulsory execution in the legitimate interests of national defence. This example is only one of many.

However, these services are not so significant as to preclude all reform. Rather than the use of absolute terms to create an immunity for all so-called "purely administrative" activities, *the scope and ambit of the immunity should be made more relative. If immunity from execution with respect to such activities were to be restated in rigid and absolute terms, immunity might too often remain the rule for most State activities, even those of an industrial or commercial nature.* We should not lose sight of the close interrelationship between these two dimensions, commercial and public, making distinctions based on the nature of administrative action often quite difficult.

In order that the distinction between the commercial and the administrative actually lead to reform, *it would be better to make immunity from execution more relative. Even though in principle this immunity would still exist, it would be useful to grant the* administrés *a definite right to execution, which would allow a more positive approach to the issue. Immunity from execution must cease to be an absolute immunity and become a relative one. In order to reverse the traditional approach, all State property (subject to certain express exceptions) would be exposed to compulsory execution,*

unless the Government or the administrative authority contemplated by the judgment can demonstrate, to the court's satisfaction, that the property in question is essential to the organization and operation of the public service. By adopting this approach, some "mixed" activities (administrative and commercial) as well as those that are purely administrative may be subject to compulsory execution process if their property is not essential to the operation of public services. *On the other hand, immunity should normally remain the rule for activities of a clearly public and social dimension (service to the community) for which any interruption in the continuity of public services would be unacceptable. Another important condition is that this option of resorting to compulsory execution against the Administration would only be available to the creditor for the execution of a final judgment, while immunity from execution would remain the rule during the course of the proceeding. In the case of non-compliance with a decision handed down by a quasi-judicial body (an administrative tribunal), the power to decide whether or not compulsory execution is necessary should rest with the Federal Court.*

The recognition of these exceptions fits within the general logic governing rules of compulsory execution. In private law, many items are declared exempt from seizure because of their social and economic importance. *By analogy with privileges granted to individuals, the federal Administration should also enjoy total immunity in areas where the social and public purpose of its activities is paramount.* Furthermore, this immunity may be enhanced with an express listing of public property declared exempt from seizure. Based on the submissions that it expects to receive, the Commission may at some point prepare such a list in subsequent research.

Except for items declared exempt from seizure, any judgment against the Government or the Administration should eventually give rise to execution against the property of the authority contemplated by the judgment. We clearly say "eventually" because *the creditor will have no immediate right to execution. He will be required to give notice to the authority concerned, as well as to the Minister of Justice, who may then contest by invoking the imperatives of proper operation of the public service. In contested cases, there would obviously be no compulsory execution against State property without leave of the court.*

To prevent the right to execution from leading to undesirable results, restrictions must be set out concerning the administrative authorities exposed to execution process. Following a judgment, execution remedies should not be directed indiscriminately against any service, department or entity. Only the administrative entity contemplated by the judgment should be liable to compulsory execution. Even if existing law does not recognize a distinct legal personality for various parts of the federal Administration (in particular, departments), a reservation to this effect could easily be introduced.

> ***Section 3*: Any judgment against the Government or the Administration may be executed upon the property of the authority contemplated by the judgment. No later than thirty days prior to any such execution, the creditor must give notice to the authority concerned as well as to the Minister of Justice, who may contest it by motion, within fifteen days, by satisfying the judge of the danger of disruption to public services. To this end, it must be shown that property liable to execution is essential to the organization and operation of services offered in the public interest or necessary for the maintenance of public order.**
>
> **To clarify the above general statement, no compulsory execution process may be authorized during the proceedings.**

Section 4: **The Government and the Administration shall have no immunity from execution in actions or suits dealing with their industrial or commercial activities.**

Section 5:

(a) Property used or destined for use in the context of military activity, and
(b) Property used for the functions of the Senate and the House of Commons,

are not subject to seizure.

(These two examples are merely hypotheses that we do not propose to defend. At this stage, it is not necessary to provide an extensive enumeration.)

These provisions distinguish between administrative activities, on the one hand, and industrial and commercial activities, on the other. *The courts must set out criteria to distinguish State activities of an industrial or commercial nature.* In principle this should pose little difficulty as they already apply such a distinction to foreign States (*jure gestionis* versus *jure imperii*). As for purely administrative action, they should be especially sensitive to administrative realities and should clearly distinguish areas whose social and public importance dictate exemption from compulsory execution. The need for this type of assessment would underline the importance of greater specialization of judges in public and administrative law.

(d) *Means of Pressure Available to Execution Creditors*

It would be unfortunate if the maintenance of immunity from execution for so-called ''purely administrative'' activities were to result in denial of any useful remedy to compel authorities to respect a judgment. Until now, execution creditors have had no meaningful recourse. *This shortcoming should be rectified to subject relations between the State and the individual to law as opposed to what is only propriety, courtesy or custom. The current situation encourages abuse, and a concrete effort must be made to find real safeguards.*

Most existing remedies are of little use to execution creditors. Even excluding problems of immunity, it is uncertain whether their use would allow effective pressure to be brought to bear on the authorities. Only contempt of court would appear to answer this need. Yet its use against federal authorities meets with a number of problems. To overcome these, the Government and the Administration must no longer be able to invoke the privileges of the Crown. If these authorities were eventually governed by a special status devolved directly from the Constitution and statutes, and no longer by a customary status based on the privileges and immunities of the Crown, the problem could be addressed in a different light.

Without wishing to discard the possibility of contempt of court or any other remedy in proposing a critical reappraisal of Crown immunities, we feel that a direct means of pressure based on monetary constraint is to be preferred. Where public authorities refuse to comply with a judgment, they would be subject to a financial penalty for each day of default. Upon motion to the court by an execution creditor, the judge could issue a provisional order condemning the Administration or the Government to pay a substantial sum of money, calculated daily, until there would be full compliance with the original judgment. This civil penalty for non-compliance should in no case be viewed as a penal or criminal remedy. Because the purpose of such a mechanism is to

bring pressure to bear on public authorities, the financial sanction aspect should predominate. It should not be confused with a recourse in damages, whose purpose is compensation. Upon compliance with the original judgment, the court would issue a final judgment which would contain the definitive amount of this monetary sanction. In finalizing the penalty, the courts could consider the circumstances which might have impeded normal execution of the principal judgment.

Although federal authorities might enjoy immunity from execution for specially designated property as well as for their activities which are not industrial and commercial in nature, they would nevertheless be exposed to financial pressure for non-compliance with judgments. This new remedy should be generalized. *There is nothing to prevent its being general in scope. It should be available to a judgment creditor even where the nature of the activities in question enables direct recourse to traditional means of compulsory execution. But it should remain an alternative, because combined use of compulsory execution and the monetary sanction would be excessive.*

> *Section 6*: **Where there is non-compliance with a final judgment by outright refusal, lateness, incomplete or partial compliance, upon motion to the court, the Government or the Administration may be condemned to pay a sum of money for each day that payment is in default, until there has been full compliance with the principal judgment.**
>
> **This monetary sanction shall take the form of a provisional order served on the Minister of Finance and the recalcitrant authority. The court shall determine the date from which the sanction is to apply. When the court is apprised of full compliance with the judicial decision, it shall adjudge the definitive amount of the sanction. In so doing, the court shall consider the circumstances that prevented the normal execution of the principal judgment.**
>
> **The proceeds of such adjudication shall be remitted to a scientific or legal research fund to be named by the court. The condemnation to this penalty shall not affect entitlement to damages for the harm resulting from non-compliance with the judgment.**
>
> *Section 7*: **Subject to the preceding sections, the creditor may have recourse alternatively to either execution process or financial constraint, but these two remedies may not be combined.**

(e) *The Right to Compensation (Set-Off)*

Where they enjoy the legal status of the Crown, federal authorities have total immunity with respect to claims by the individual for set-off or compensation. In the course of litigation (this is the common law position), or even in its absence (the civil law solution), a private individual has no hope of benefitting from set-off or compensation of his debt with a debt owed by public authorities. The latter enjoy an absolute total discretion as to the timing and the manner of repaying public debts.[154]

154. This immunity to set-off may also be invoked against the Canadian provinces, a matter that puts us in the delicate context of federal-provincial relations with respect to fiscal transfer payments and reciprocal debts. The constitutional dimension of set-off is too complicated to be satisfactorily addressed by a study focussed on administrative law and relations between the State and the individual.

The individual's entitlement to compensation should be stated unequivocally. Even where two debts do not originate from the same service (for example, A is sued for a monetary claim by Commission X, while at the same time Department Y owes him a comparable sum), a right of compensation is now facilitated by the degree of centralization and computerization of the federal Administration. Communications and exchanges between services are sufficiently developed so that two different debts, both liquidated and demandable, may be compensated. Subject to certain exceptions, especially concerning taxes and fines, all debts should be subject to compensation by right.

> ***Section 8*: Where a monetary claim has been presented by the Government or the Administration, any individual may invoke the right to compensation if these authorities also owe him a sum of money that has become demandable.**

(This section may eventually be completed with some exceptions, to remove some types of debts from the scope of compensation. Any such exceptions should be justifiable and relatively rare, so as not to undermine the generality of the principle.)

Clearly, this formulation gives compensation a broader scope than common law set-off. *The right to compensation should exist outside the context of litigation and within the normal framework of relations between the Administration and the individual.*

(f) *Scope of the Proposed Reform*

This Study Paper is only one step in the development of a coherent legal status for the federal Administration as a whole. With respect to compulsory execution, it puts forth proposals which could perhaps constitute the law applicable to the federal Administration, as is at present the case for the provisions of the *Crown Liability Act* and the *Federal Court Act*, to cite only two examples. *It must be understood that provincial legislation on execution could only apply subject to the provisions here proposed.* There are two reasons for this.

It is quite logical for federal enactments to govern the federal Administration, provincial law having only an auxiliary scope. Rather than leave it completely up to the courts and provincial legislators, the federal authorities should play a much more dynamic role in modernizing federal administrative law.

The second reason is based on the nature of our proposals. Compulsory execution is allowed as part of a special scheme of public law which can only exist in light of distinctions which are proper to administrative law. The general provincial competence in private law granted by subsection 92(13) of *The Constitution Act, 1867* is not admissible to a special scheme of administrative law applicable to federal authorities. Parliament should assume its normal responsibilities in this area.

Such a problem has already been resolved in the *Garnishment, Attachment and Pension Diversion Act*. When introducing this special legislative scheme, Parliament was careful to specify, in section 17, that:

> In the event of any inconsistency between this Part, any other Act of Parliament or a regulation made under this Part or under any other Act of Parliament, and the provincial garnishment law, the provincial garnishment law is overridden to the extent of the inconsistency.

Similar provisions should be included not just in the area of execution but in all enactments concerning the legal status of the federal Administration.

In drawing up these eight sections, we are not trying to do the work of a legislative drafter. These sections should be read for their content, not their form. They make possible the concretization of what could be a substantial reform of immunity from execution. Inspired in part by public international law and by French and American law, they essentially aim at making immunity from execution a relative immunity, not an absolute one as it is now. Their rather technical nature should not be surprising, since the scheme's effectiveness can only be assured with precise and rigorous safeguards.

Bibliography

Frequently Used Abbreviations

A.C.D.I.	Annuaire canadien de droit international
Adm. L. Rev.	Administrative Law Review
A.J.D.A.	Actualité juridique, Droit administratif
A.J.I.L.	American Journal of International Law
Cam. L.J.	Cambridge Law Journal
Can. Bar Rev.	Canadian Bar Review
C. de D.	Cahiers de droit
C.E.	Conseil d'État
C.L.P.	Current Legal Problems
Colum. L. Rev.	Columbia Law Review
C.P.A.	Canadian Public Administration
D.	Dalloz
E.D.C.E.	Études et documents du Conseil d'État
G.P.	Gazette du Palais
Harv. L. Rev.	Harvard Law Review
I.R.A.S.	International Review of Administrative Sciences
J.C.P.	Juris-classeur périodique (La Semaine Juridique)
J. Pub. L.	Journal of Public Law
J.T.	Journal des tribunaux
L.R.C.C.	Law Reform Commission of Canada
Man. L.J.	Manitoba Law Journal
M.L.J.	Michigan Law Journal
M.T.P.	Moniteur des travaux publics
P.L.	Public Law
R.A.	Revue administrative
R.C.A.D.I.	Recueil des cours de l'Académie de Droit International
R. de D. Pr.	Revue de droit prospectif
R.D.I.D.C.	Revue de droit international et de droit comparé
R.D.P.	Revue du droit public
R. du B.	Revue du Barreau
R.F.D.A.	Revue française de droit administratif
S.	Sirey
U. Chi. L. Rev.	University of Chicago Law Review
U. of T.L.J.	University of Toronto Law Journal

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